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## EVIDENCE TAMPERING

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### ABSTRACT

*Current writing on “evidence tampering”—inclusive of the destruction, fabrication, and suppression of evidence—creates the impression that our system of litigation is in a state of fundamental disrepair. This Article suggests that this perception may merely reflect defects in the conventional view of trial’s purpose. The conventional view sees trial as a stand-alone device for uncovering microhistorical truths about what has already come to pass. In contrast, this Article advocates viewing trial as but one component of the overall mechanism by which the legal system influences everyday behavior.*

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*When trial is viewed less in terms of discerning past events, and more in terms of shaping future events, several apparently troublesome aspects of the existing system's treatment of evidence tampering gain substantial justification, and the way is paved for a more fruitful evaluation of current doctrine.*

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## INTRODUCTION

Headlines periodically remind us that the production of evidence is a game whose rules can be broken. In the 1980s, Oliver North

destroyed key documents during the Justice Department's Iran-Contra investigation.<sup>1</sup> In the 1990s, President Clinton lied under oath about his involvement with White House intern, Monica Lewinsky.<sup>2</sup> In the early 2000s, Arthur Andersen shredded trunkloads of audit-related documents during an SEC inquiry into Enron's special purpose entities.<sup>3</sup>

In fact, according to many judges and practitioners, evidence tampering<sup>4</sup> is hardly confined to blockbuster events.<sup>5</sup> Documents that should be produced in response to a discovery request are regularly shredded, altered, or suppressed. Witnesses frequently lie to investigators, deponents, and courts. Fact finders are routinely misled by the fabrication or destruction of evidence.

Academic analysis of evidentiary foul play, however, is far from common. On the evidence scholar's bookshelf, a few lonely volumes

1. See *Quotations of the Day*, N.Y. TIMES, Feb. 22, 1989, at A2 ("When the time came for Oliver North to tell the truth, he lied. When the time came for Oliver North to come clean he shredded, he erased, he altered. When the time came for Oliver North to let the light shine in, he covered up."—John W. Kecker, prosecutor.).

2. Jones v. Clinton, 36 F. Supp. 2d 1118, 1121–1125 (E.D. Ark. 1999); RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 55-1, at 772–73 n.4 (2002).

3. Kurt Eichenwald, *Andersen Misread Depths of the Government's Anger*, N.Y. TIMES, Mar. 18, 2002, at A1; see also Indictment at 5–8, United States v. Arthur Andersen, LLP, No. CRH-02-121 (S.D. Tex. filed Mar. 7, 2002).

Since this Article was written, domestic icon Martha Stewart and her broker, Peter Bacanovic, were convicted of obstruction of justice, perjury, and related offenses in connection with Stewart's fortuitous sale of Imclone stock. Constance Hays & Leslie Eaton, *Stewart Found Guilty of Lying in Sale of Stock*, N.Y. TIMES, Mar. 6, 2004, at A1; see also Superseding Indictment, United States v. Stewart, No. 03 Cr. 717 (MGC) (S.D.N.Y. Jan. 4, 2004).

4. This Article uses the term "evidence tampering" to refer to the full range of activities by which parties alter the natural evidentiary "emissions" of the transactions and occurrences that may give rise to suit. Some of these activities add to the set of natural emissions. These include fabricating documents or things, or lying to investigators, deponents, or the court. Other activities reduce the set of natural emissions. These include destroying or preventing the creation of documents and things, or bribing witnesses not to testify. As discussed in detail in Part II, not all of these activities are subject to sanction under current law. Indeed, there is a fine line—if any line at all, in principle—between some of these activities and the legitimate "production" evidence. See, e.g., Chris W. Sanchirico, *Relying on the Information of Interested—And Potentially Dishonest—Parties*, 3 AM. L. & ECON. REV. 320, 320–41 (2001) (emphasizing the importance of the probabilistic dependence of evidence presentation costs—and by extension, evidence destruction costs—to regulating out-of-court behavior). Nevertheless, for the purposes of this Article, I take as given that there is much to be said about the regulation of evidence tampering without first resolving this definitional boundary problem.

5. See *infra* Part I.

on perjury, obstruction, and spoliation<sup>6</sup> hide among numerous tomes on hearsay, character, privilege, experts, and the like. An uncharitable assessment might characterize the field as more concerned with whether the declarant herself testifies than with whether what she says is truthful. To be sure, rules prohibiting hearsay are often said to be designed in part to prevent foul play.<sup>7</sup> But notwithstanding sideways glances of this sort, evidence tampering has been something of a Medusa in evidence scholarship. Though recognizing its presence, the field has largely been reluctant to stare directly at the problem.

Among the few scholars who have investigated the web of rules that police evidence tampering, the most common reaction might be characterized as dismay. Some distillation reveals that this response is largely inspired by two perceptions regarding the current system. First, commentators perceive a dissonance between the apparent epidemic of evidence tampering, on the one hand, and the leniency of the rules prohibiting such behavior on the other.<sup>8</sup> Second, commentators view the practical prohibitions that do exist as myopic, given the almost exclusive focus of these prohibitions on tampering directly connected to specific ongoing or imminent litigation. Such rules, it is argued, merely encourage parties to shift their manipulative behavior “upstream” toward the underlying transaction or occurrence and away from specific litigation, with little or no impact on the problem.<sup>9</sup>

This Article allies itself with the small existing literature on evidence tampering in viewing the topic as worthy of far more attention than it receives. It parts company with that literature, however, in proposing that the dismay expressed in previous scholarship may well be misplaced. It contends that such dismay is more the result of a conceptual imbalance regarding the object of evidentiary process than an indication that the current system is in a state of fundamental disrepair.

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6. The term “spoliation” most commonly refers to the destruction or alteration of documents, though its meaning may also encompass a broader range of activities. See Jay E. Rivlin, Note, *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor*, 26 HOFSTRA L. REV. 1003, 1004 n.2 (1998).

7. See, e.g., GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 180–81 (1996) (listing exposing deception as a purpose of cross-examination and a basis for the hearsay rule).

8. See *infra* notes 52–96 and accompanying text.

9. See *infra* notes 119, 360, and accompanying text.

The imbalance concerns the ex ante versus ex post purposes of law. Regarding law's ex ante function, one need not look far for explanation or justification. When it comes to analyses of the "substantive law," the idea that legal rules set incentives for everyday behavior—incentives to perform as contracted, to disclose accurate financial information, to take reasonable precaution, to adopt a safe product design, to eschew physical violence—occupies a central position.<sup>10</sup> In recent decades, the importance of this ex ante approach has only increased, as law and economics has become ever more assimilated into legal scholarship.<sup>11</sup> In the modern teaching of torts, contracts, or criminal law, explicit reference to how such legal rules influence behavior is *de rigueur*.

At the same time, the study of the essential informational link between the substantive law and the day-to-day behavior that it supposedly regulates—namely, evidentiary process—retains a predominantly ex post perspective. Most analyses of evidence law take litigation's prime object to be the discovery of truth about past events.<sup>12</sup> The role that evidence law plays alongside the substantive law in shaping truths that have yet to materialize receives scant

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10. See, e.g., Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 378–79, 422–23 (1994) (citing deterrence as the primary rationale for tort law among mainstream legal scholars).

11. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 1–3 (3d ed. 2000) (providing evidence of the influence of economics on legal scholarship).

12. See, e.g., William Twining, *Evidence and Legal Theory*, 47 MOD. L. REV. 261, 272 (1984) (stating that according to the "dominant underlying theory of evidence . . . the primary end of adjudication is rectitude of decision"). With specific relation to evidence tampering, see JAMIE S. GORELICK ET AL., *DESTRUCTION OF EVIDENCE* § 1.11, at 14 (1989) ("The most obvious and perhaps the strongest justification for restricting the destruction of evidence is that destruction reduces the likelihood that the judicial process will reach accurate results."); John H. Beckstrom, *Destruction of Documents with Federal Antitrust Significance*, 61 NW. U. L. REV. 687, 689 (1966) (discussing the truth-finding benefits of a statute requiring businesses subject to federal antitrust laws to retain certain documents for a period of time to help prevent document destruction); Dale A. Nance, *Missing Evidence*, 13 CARDOZO L. REV. 831, 832, 881–82 (1991) (arguing that law's response to the "missing evidence" problem evinces its primary concern with trial accuracy); Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991) ("[Spoliation] is a form of cheating which blatantly compromises the idea of the trial as a search for the truth."); Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185, 1187–88 (1983) (analyzing document destruction in light of increased truth-finding and litigation costs); Lisa C. Harris, Note, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1755 (1996) ("[T]he crime of perjury is the antithesis of truth that is the ultimate objective of the judicial system.").

attention.<sup>13</sup> Oddly, this is largely true even among the few economics-oriented scholars who study evidence.<sup>14</sup>

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13. To be sure, the fact that the ex post perspective predominates the study of process does not mean that it reigns in isolation. Nearly all proceduralists are willing to admit a place for “deterrence” in the pantheon of social policy objectives by which they take the measure of doctrine. *See, e.g.,* GORELICK ET AL., *supra* note 12, § 1.11, at 15 (“[D]estruction of evidence strikes indirectly at . . . utilitarian goals served by [substantive law].”). But whereas the social objective of truth-finding has finely chiseled features following generations of careful attention, “deterrence” remains more or less a block of stone.

Several authors have challenged the dominance of ex post truth-seeking by advocating for alternatives other than primary activity incentive setting. *See, e.g.,* LEO KATZ, *ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW* 59–60, 67–73 (1996) (arguing that aspects of evidence law difficult to reconcile with the consequentialist goal of accurate trial outcomes are well explained by recourse to deontological concerns regarding the path taken to reach such outcomes); STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 3 (1984) (emphasizing the importance of dispute resolution rather than truth-seeking in the adversary system); Mirjan Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 303–04 (1998) (discussing how a focus on lawmaking in legal proceedings reduces the importance of fact-finding accuracy); David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 2–3 (1986–87) (pointing to trial’s role in producing social and individual “catharsis,” achieved through visceral satisfaction with legal process); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1358, 1359, 1373, 1378 (1985) (arguing that the purpose of judicial process is to induce individuals to internalize the instruction of the law and, to this end, to produce “acceptable verdicts,” which are not necessarily “probable verdicts”).

14. *See, e.g.,* Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18, 30 (1986) (analyzing the incentive to omit evidence and positing truth revelation as the policy objective); *see also* Luke M. Froeb & Bruce H. Kobayashi, *Naive, Biased, Yet Bayesian: Can Juries Interpret Selectively Produced Evidence?*, 12 J.L. ECON. & ORG. 257, 257 (1996) (arguing that the legal system is likely to generate unbiased estimates of liability and damages despite the jury’s naiveté and initial bias); Daniel L. Rubinfeld & David E.M. Sappington, *Efficient Awards and Standards of Proof in Judicial Proceedings*, 18 RAND J. ECON. 308, 309 (1987) (analyzing standards of proof and positing as the social objective the minimization of the sum of loss-weighted false convictions, loss-weighted false acquittals, and the litigation effort of defendants); Joel Sobel, *Disclosure of Evidence and Resolution of Disputes: Who Should Bear the Burden of Proof*, in *GAME-THEORETIC MODELS OF BARGAINING* 341, 351–59 (Alvin Roth ed., 1985) (analyzing a model in which maximizing social welfare is equivalent to minimization of loss-weighted trial error plus evidence costs).

In the law review literature, *see, for example,* Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 381 (1991):

Under a theory of adjudication that emphasizes deterrence, [an] unskewed increase in favorable and unfavorable information presented ought to improve the tribunal’s ability to distinguish desirable from undesirable conduct. This in turn increases expected sanctions for those who act undesirably at the same time that it decreases sanctions for those who act desirably.

and Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1480–84 (1999), which posits trial error minimization as the goal of evidence law.

This Article suggests that the sizable gap between how the system actually regulates evidentiary foul play and how commentators believe it should is largely the result of the fact that the literature's treatment of litigation's *ex ante* purpose is disproportionately cursory compared to the prominence of this purpose in actual system design. In particular, the Article shows that both sources of scholarly consternation regarding evidence tampering—the law's apparently Neronian attitude toward evidence tampering, as well as the supposedly myopic approach of the steps it does take—are more easily reconciled with an approach to evidence

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There are exceptions. *See, e.g.*, A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigating and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99, 99–100 (1989) (examining the relationship between deterrence and truth-finding); *see also* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 312–14 (arguing that when there is perfect information about whether an accident has occurred, there is no incentive difference between charging the injurer with the harm that she expected to cause or the harm that she actually did cause, even though the later assessment of damages is in a sense more accurate); Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191, 192, 194, 201–02 (1996) (claiming that “accuracy in assessment of harm cannot influence the behavior of injurers . . . to the degree that they lack knowledge of the harm they might cause when deciding on their precautions”); Chris W. Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1259–63 (contrasting “trace evidence” and “predictive evidence” and arguing, in the context of character evidence, that the use of “predictive evidence” at trial, though helpful for truth-finding, may be harmful for primary activity incentive setting); Chris W. Sanchirico, *Games, Information and Evidence Production: With Application to English Legal History*, 2 AM. L. & ECON. REV. 342, 342–43 (2000) (extending the model in Sanchirico, *supra* note 4, to examine the trade-off between the “fixed” and “variable” evidentiary costs of litigation); Sanchirico, *supra* note 4, at 320 (modeling “the role of evidence production in the regulation of private behavior via judicial and administrative process”); Joel Schrag & Suzanne Scotchmer, *Crime and Prejudice: The Use of Character Evidence in Criminal Trials*, 10 J.L. ECON. & ORG. 319, 319–24 (1994) (finding that the optimal threshold quantum of evidence for guilt is systematically lower when the object is taken to be error minimization, rather than maximal deterrence); Chris W. Sanchirico, *Enforcement by Hearing: How the Civil Law Sets Incentives* (Columbia Economics Dep’t, Discussion Paper No. 95-9603, 1995) (first circulated version of model in Sanchirico, *supra* note 4); Chris W. Sanchirico & George Triantis, *Evidentiary Arbitrage: The Fabrication of Evidence and the Verifiability of Contractual Performance* 2–4 (Sept. 2002) (unpublished manuscript, on file with the *Duke Law Journal*) (questioning the emphasis on “verifiability” in contract scholarship), available at <http://papers.ssrn.com/sol3/Delivery.cfm/99030901.pdf?abstractid=10033>.

Note that a sizable portion of the economic analysis of *procedure* does ground itself in the goal of setting incentives for everyday behavior. However, this literature is not concerned with the issue of how claims are proven; most models simply posit exogenous probabilities for possible trial outcomes. Rather, the focus of this research program is on other aspects of litigation, such as filing and settlement behavior. *See generally* ROBERT BONE, *BONE’S CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* (2003) (surveying major advances in the economics of civil procedure).



law that emphasizes setting “primary activity”<sup>15</sup> incentives rather than discerning past primary activity behavior.

Consider first the law’s purportedly lackadaisical attitude toward tampering. Determining whether the law devotes an appropriate amount of energy to the problem of evidence tampering requires understanding the social costs and benefits of enforcing evidence-tampering law.

The social costs of anti-tampering enforcement, which are well understood by scholars in this area,<sup>16</sup> are roughly the same whether one takes the purpose of process to be truth-finding or primary activity incentive setting. Accordingly, such costs do not play a leading role in distinguishing these two approaches. Nor, therefore, do they play a leading role in this Article. Nonetheless, it is important to bring these costs to the fore upfront, to take off the table the notion that more enforcement is always better under any approach.

Such social costs consist essentially of the costs of running a second layer of legal process to adjudicate behavior, not in the primary activity, but in the primary layer of legal process.<sup>17</sup> Prosecuting a litigant for obstructing<sup>18</sup> her primary prosecution for narcotics trafficking, for instance, requires diverting prosecutorial resources away from other offenses, including narcotics crimes. The obstruction defendant, in addition, will divert private resources away from potentially productive activity toward her second-layer defense. And society must then pause to entertain arguments and evidence on each of the several elements of the obstruction crime. Likewise, imposing sanctions for the destruction of evidence under either specific procedural rules<sup>19</sup> or the court’s “inherent power”<sup>20</sup> requires holding secondary hearings to determine whether evidence was in fact destroyed, and if so, its likely content, the destroyer’s state of

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15. Following common usage, I use the term “primary activity” to refer to the underlying transaction or occurrence that may give rise to litigation.

16. See, e.g., Oesterle, *supra* note 12, at 1187 (analyzing the effect of evidence destruction on litigation costs); GORELICK ET AL., *supra* note 12, § 3.11, at 96 (describing the costs of hearings on evidence tampering).

17. Indeed, the costs of policing tampering accrue in a theoretically infinite regress, as was hinted at when the government recently indicted a witness for perjuring himself in Martha Stewart’s trial for perjury, obstruction, and related offenses. Jonathan D. Glater, *Stewart Stock Case is Jolted by Charge That an Agent Lied*, N.Y. TIMES, May 22, 2004, at A1.

18. See *infra* Part II.A.1.

19. See *infra* Part II.B.1.

20. See *infra* Part II.B.2.

mind, and the extent to which the destruction prejudiced the other side.<sup>21</sup>

Unlike the social costs of policing and punishing evidence tampering, the social benefits of these activities differ markedly depending on whether one takes a truth-finding or primary activity approach. These different benefits are the subject of Part III. As explained therein, truth-finding benefits come primarily from two sources: the deterrence of tampering and the ability to rectify trial outcomes when those tamperers who are not deterred are caught in the act.<sup>22</sup> In contrast, and somewhat counterintuitively, the main primary activity benefit of increasing anti-tampering enforcement derives from the fact that such enforcement worsens the prospect of ending up as a litigant who still finds the tampering worthwhile.<sup>23</sup>

These different sources of social benefit lead to different views of the appropriate intensity of anti-tampering enforcement.<sup>24</sup> The truth-finding benefits of increasing anti-tampering enforcement turn out to have a self-enhancing quality: the greater the current level of enforcement, the greater the incremental benefits of additional enforcement.<sup>25</sup> This quality is largely inconsistent with a middling level of enforcement effort. Were the truth benefits of increasing anti-tampering enforcement up to a middling level worth the social cost, so too would be increasing enforcement from a middling level to a high level.<sup>26</sup> In contrast, the primary activity benefits of anti-tampering enforcement are self-dampening: the more we increase anti-tampering enforcement, the less reason there is to continue to increase it.<sup>27</sup> It follows that from a primary activity perspective, the law's seemingly halfhearted approach may well be appropriate.<sup>28</sup>

The Article's discussion of general enforcement effort centers on this distinction between self-enhancing truth benefits and self-dampening primary activity benefits. But, in fact, expressions of

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21. See, e.g., GORELICK ET AL., *supra* note 12, § 3.11, at 96 (recounting a case where the hearing to determine whether the spoliator knew that the destroyed documents were relevant “lasted 23 days and generated 3,000 pages of transcript, approximately 2,000 pages of depositions introduced into evidence, and thousands of pages of documentary exhibits”).

22. See *infra* Part III.A.3.

23. See *infra* Part III.A.4.

24. See *infra* Part III.B.

25. See *infra* Part III.B.2.

26. See *infra* Part III.B.3.

27. See *infra* Part III.B.1.

28. See *infra* Part III.B.3.

dismay regarding the law's laissez-faire attitude toward evidence tampering implicate not just the general intensity of enforcement, but also the methods of enforcement employed. Here too, as explained in Part III, the implications of the primary activity approach are both distinct from those of the truth-finding approach and better aligned with current law.<sup>29</sup>

First, in creating a given level of legal risk for the potential tamperer, the primary activity approach provides less of a reason than the truth-finding approach to emphasize the frequency with which tampering is detected, as opposed to the size of the sanction imposed.<sup>30</sup> And indeed, though it may be that only a small proportion of tamperers are caught under the current regime—as is often claimed<sup>31</sup>—when they are caught, punishments can be severe.<sup>32</sup>

Second, in the event that tampering is uncovered, there is less reason under the primary activity approach than under the truth-finding approach to correct litigation outcomes that have already been skewed as a result of the tampering.<sup>33</sup> This may help explain the law's otherwise dismaying reluctance to make such *ex post* corrections under current law.<sup>34</sup>

The second source of scholarly dismay with evidence tampering law is commonly characterized not as a problem of lax enforcement, but as a problem of focus—myopia, to be specific. As noted, the law tends to penalize evidence tampering only when it occurs far downstream in the flow from primary activity through filing, discovery, and trial.<sup>35</sup> After challenging conventional explanations for this enforcement regularity, Part IV of this Article puts forward an alternative explanation founded on how the private benefits of evidence tampering change along the course of litigation.

The point of departure in Part IV is the suggestion that our system of fact-finding is remarkably inscrutable when viewed from an upstream perspective. A manufacturer of dangerous products, for example, may have little sense *ex ante* of precisely which evidentiary emissions will end up as damaging evidence in future lawsuits.

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29. *See infra* Part III.C.

30. *See infra* Part III.C.1–2.

31. *See infra* Part III.C.3.

32. *See infra* Part II.

33. *See infra* Part III.C.1–2.

34. *See infra* Part III.C.3.

35. *See infra* Part II.

Exacerbating this uncertainty is the fact the plaintiff is in large measure free to meet her burden of persuasion however she prefers—using whatever combination of evidentiary offerings she chooses.

Whatever its drawbacks along other dimensions, the *ex ante* inscrutability of fact-finding lowers the private benefits of evidence tampering. When one is less able to predict whether a given piece of evidence will be decisive in future litigation, the benefits of tampering with it are reduced.<sup>36</sup>

Clearly, however, the evidentiary lay of the land comes into sharper focus for the parties as they head toward trial. By the time they pass through process's lower reaches, therefore, tampering is no longer as effectively discouraged by the system's erstwhile inscrutability. Consequently, other more direct devices—like spoliation inferences, discovery sanctions, or the threat of obstruction charges—become necessary to fill the growing regulatory void.<sup>37</sup>

These are the main substantive points of the Article. But before turning to their detailed exposition, some clarifying remarks on scope and methodology are in order.

After scarcity, the second most notable feature of scholarship on evidence tampering is fragmentation.<sup>38</sup> In general, the few scholars who have written in the area write on either perjury,<sup>39</sup> or evidence destruction,<sup>40</sup> or missing witnesses,<sup>41</sup> or some other isolated genre of manipulation. Very few treat the problem of evidence manipulation generically.<sup>42</sup>

But despite the inevitable sacrifice of detail and the necessity of spanning several fields of legal scholarship, there is arguably much to

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36. See *infra* Part IV.A.

37. See *infra* Part IV.C.

38. Cf. Lawrence B. Solum & Stephen J. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1191–92 (1987) (criticizing “doctrinal isolationism” even within the specific rules governing evidence destruction).

39. See, e.g., Rebecca Kislak & John J. Donoghue, *Perjury*, 36 AM. CRIM. L. REV. 957 (1999).

40. See, e.g., GORELICK ET AL., *supra* note 12; MARGARET M. KOESEL ET AL., *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* (2000).

41. See, e.g., Robert H. Stier, Jr., *Revisiting the Missing Witness Inference—Quieting the Loud Voice from the Empty Chair*, 44 MD. L. REV. 137 (1985).

42. Exceptions include Joseph M. Livermore, *Absent Evidence*, 26 ARIZ. L. REV. 27 (1984), who considers simultaneously missing witness instructions, use of weaker evidence when stronger evidence is available, and the failure to create or preserve evidence, and Nance, *supra* note 12, who deals with “missing evidence” generically.

be gained from an integrated treatment, if only because the potential evidence manipulator is likely also to take a holistic approach, viewing fabrication, destruction, suppression, coercion, bribery, and the like as potential substitutes and complements. This Article specifically attempts to parallel the manipulator's integrated approach.

Accordingly, the Article is forced to make the requisite sacrifices to doctrinal detail, both generally throughout, and also specifically, by focusing on the regulation of evidence tampering as it affects civil litigation in federal district court between private parties. This focus certainly does not insulate the project from administrative or criminal law, since these may be implicated by private suit behavior. But it does, nonetheless, bound the topic. Not considered herein, for example, are the special constitutional issues surrounding the destruction of evidence by police and prosecutors.<sup>43</sup>

Second, a remark on method. Following Professor Nesson, who in turn takes his lead from Justice Holmes,<sup>44</sup> this Article measures anti-tampering law by its effect on the behavior of the "bad person": the person who makes a coolly "rational" assessment of whether shredding, fibbing, or forging furthers her selfish interests, with no serious consideration of the ethical implications of her behavior. Nesson justifies designing doctrine according to its effect on the "bad" based on the risk that market evolutionary forces will otherwise drive out the "good."<sup>45</sup> The choice of a similar approach in this Article derives in part from Nesson's concern, but also from an additional consideration that goes more to incidence than evolution. Even if it were determined, contrary to Nesson's hypothesis, that an

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43. See, e.g., GORELICK ET AL., *supra* note 12, §§ 6.1–6.25, at 205–48 (discussing the problems that arise when evidence is destroyed by prosecutors or police in criminal proceedings).

44. See Nesson, *supra* note 12, at 795:

Holmes tells us to consider the law from the vantage of a "bad man" who cares only for the material consequences of his actions . . . . Unlike good men and women who are influenced by conscience, the bad man is unmoved by soft considerations of ethics and morality except as they translate, through the actions of others, into bottom line effects.

(citing Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897)).

45. See *id.* at 805:

I do not believe that lawyers are stereotypically Holmesian bad men, or that the law should assume that they are. But neither are they saints. Many lawyers will consider these incentives and succumb to the powerful temptation to spoliage. And once some lawyers begin to serve their clientele through spoliation, the marketplace will force others to follow suit.

evolutionarily stable majority of litigants behave legally and ethically,<sup>46</sup> a system not specifically designed to guard against the minority who manipulate it would be a system that essentially taxes the ethical to subsidize the unethical.

A final point on methodology. Although this Article is concerned with explaining existing law, the object here is not to provide just-so stories for existing doctrine. In the first place, the justifications for existing law that are provided apply only to the broadest contours of the law in this area. A large set of interesting (though arguably secondary) issues are left aside. Secondly, as the reader will see, the analysis herein is less a justification than a suggestion to revise the justifying criteria—by shifting the focus from truth-finding to primary activity incentive setting.

That said, the Article does argue for this revision of justifying criteria specifically by making the case that the implications of the primary activity approach fit better with existing doctrine. This reflects the methodological conviction that it is in some cases legitimate to discipline legal analysis by treating as a “rebuttable presumption” the proposition that the basic outline of existing law makes sense.

Anchoring the analysis in existing law may be especially justified when it comes to evidence tampering, where the gap between what the law is and what most scholars believe it should be has been so persistent over time. Modern treatments of evidence tampering may well entice the reader with the claim that the problems of spoliation and perjury have become much more serious in recent years. But, in fact, researchers in this area have been making similar claims of urgency for at least the last five decades. In what remains one of the most thoughtful (and undervalued) treatments of document destruction, Professor Beckstrom, writing in 1966, warns of the growing prevalence of document “retention” policies (twice as many at U.S. corporations in 1961 as in 1957),<sup>47</sup> discusses the existence of firms specializing in the “storage” of business documents,<sup>48</sup> considers

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46. Behavioral law and economics offers compelling evidence that some portion of the population is indeed “fair-minded.” See, e.g., Colin F. Camerer & Richard H. Thaler, *Ultimatums, Dictators and Manners*, 9 J. ECON. PERSP. 209, 209 (1995); Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. ECON. PERSP. 159, 159 (2000) (documenting that “many people deviate from purely self-interested behavior in a reciprocal manner”).

47. Beckstrom, *supra* note 12, at 688–89.

48. *Id.* at 714.

the impact of data processing and computer science,<sup>49</sup> and attests to the growing prevalence of document destruction in antitrust settings.<sup>50</sup> Things have certainly changed since 1966. But the gap between scholarship and practice is apparently not one of them.

The rest of the Article is organized as follows. Parts I and II critically assess the two above-mentioned sources of scholarly dismay on their own terms. In particular, Part I examines the dual empirical proposition that the law is lackadaisical in policing evidence tampering and that such tampering is commonplace in actual process. Part II assesses the claim that what practical prohibitions exist are too exclusively focused on activities directly connected in time and effect to specific ongoing or imminent litigation. Because of the nature of these respective claims, Part I concerns mainly data, Part II mainly doctrine. Taken together the two parts also serve as a general review of evidence tampering in law and practice, an exercise justified, perhaps necessitated, by the dearth of attention devoted to evidence tampering in scholarship to date.<sup>51</sup>

Parts III and IV contrast the primary activity and truth-finding approaches to the two sources of scholarly unease. Part III concerns the law's purportedly lackadaisical attitude. Part IV addresses the law's apparently myopic approach. Concluding remarks and a technical appendix complete the Article.

## I. THE LAW'S NERONIAN ATTITUDE: DATA

Commentators who approach evidence tampering from a truth-finding perspective find the legal regime lackadaisical and myopic. This Part of the Article investigates the empirical basis for the first of these concerns, breaking it down into two separate claims: that evidentiary foul play is rampant and that the law has been looking the other way.

The findings on both claims are mixed. On the one hand, both enjoy surprising unanimity among experts in the field. On the other hand, however well grounded in personal experience, both are unsupported by systematic empirical investigation. Data is often cited, to be sure. But a peek behind the numbers reveals their lack of reliability and relevance.

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49. *Id.* at 714–15.

50. *Id.* at 768–69.

51. Readers who wish to move quickly to the Article's main points, however, can focus on the summaries in Sections I.C. and II.E.

The Part ends with a consciously forced assessment of the empirical landscape and a resolution to move forward provisionally, accepting for the purpose of argument that the legal regime regulating evidence tampering is running far short of full tilt.

A. *Is Legal Process Burning?*

1. *Impressionistic Evidence.* Impressionistic evidence that tampering is unexceptional is easy to come by. On the topic of fabrication, Federal District Judge Marvin H. Shoob remarks that “people would be shocked if it were truly known how many witnesses lied under oath in a court of law every day.”<sup>52</sup> Milwaukee prosecutor E. Michael McCann, former chair of the ABA Section of Criminal Justice, provides the vivid metaphor that “if perjury were water, the people in civil court would be drowning.”<sup>53</sup> Chief Judge Richard A. Posner of the Seventh Circuit notes that “[i]t is not unusual for one judge to say to another that he or she has just presided at a trial at which several of the witnesses were obviously lying.”<sup>54</sup>

Regarding evidence destruction, the leading treatise on the topic similarly notes:

During the course of our work, many litigators privately confided to us that, at some point in their careers, they suspected or were confronted with the fact that documents were deliberately destroyed by their clients or their opponents. Public confirmation of these suspicions was not hard to find.<sup>55</sup>

In sum, the assertion that evidence tampering is a common occurrence is at least itself a common pronouncement.<sup>56</sup>

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52. Mark Curriden, *The Lies Have It*, 81 A.B.A.J. 68, 69 (1995).

53. *Id.* at 70.

54. RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 147 (1999); see also Richard H. Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 813 (1993) (“All guilty defendants who choose to testify will lie on the stand about anything that might improve their chances and about which they imagine they can be persuasive.”).

55. GORELICK ET AL., *supra* note 12, at ix.

56. See, e.g., KOESEL ET AL., *supra* note 40, at xi (“Spoliation of evidence is an unfortunate reality of modern-day civil litigation.”); Beckstrom, *supra* note 12, at 715 (“[W]illful document destruction in antitrust settings has been revealed in a number of cases, and from this fact alone it is reasonable to speculate that, as with an iceberg, this is only a sample of what is below the surface.”); Steven M. Cohen, *What Is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 817–18 (2002) (arguing as a former Assistant U.S. Attorney that witness cooperators often lie to police); Curriden, *supra* note 52, at 70 (quoting a prominent trial judge



2. *Systematic Empirical Analysis.* But for a phenomenon that everyone seems to think happens all the time, tampering remains surprisingly elusive in systematic empirical analysis.<sup>57</sup> The few empirical findings mentioned in the literature are often carelessly employed and, on closer inspection, ultimately inconclusive.<sup>58</sup> Consider, first, the two most frequently cited studies.

a. *Looking for Mr. Pepke.* In support of the claim that spoliation is a pervasive problem, several recent law review articles cite to a survey conducted, apparently circa 1991, by “Harvard Law Professor Charles R. Nesson.”<sup>59</sup> Nesson’s survey, these articles

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as saying that perjury “is so widespread and pervasive that it has become a major concern among trial judges”); *id.* (quoting a state trial judge as saying: “I think there is an element out there beginning to realize that you can walk into court, take the oath, lie up a storm, and not have to worry about being punished for it, even if you are caught.”); Edward J. Imwinkelried, *A New Antidote for an Opponent’s Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent’s Case*, 1993 BYU L. REV. 793, 794 (1993) (“The general consensus is that misconduct is widespread during discovery.”); Nesson, *supra* note 12, at 793 (“It is impossible to know precisely how common spoliation is today. Interviews and surveys of litigators suggest a prevalent practice.”); Steffen Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 ST. MARY’S L.J. 351, 353 (1995) (“Destruction or spoliation of evidence in civil litigation has undermined the integrity of the adversary system.”); Oesterle, *supra* note 12, at 1186 (“The naked truth is that many corporations purposefully operate programs to destroy evidence.”); Harris, *supra* note 12, at 1777 (“[P]erjury in the courtrooms continues to skyrocket seemingly out of control.”); Laura Mansnerus, *Lying Rampant in Civil Suits, but Prison for Lying Is Rare*, N.Y. TIMES, Feb. 22, 1998, at A22 (“[L]egal experts agree that in ordinary civil suits, lying is rampant . . .”).

Even sources that explicitly advise against tampering also implicitly indicate that it is a frequent occurrence. *See, e.g.*, GORELICK ET AL., *supra* note 12, § 18.1, at 381 (advising against evidence destruction while also stating that “[p]ersons under investigation for tax violations often . . . panic and take steps to ‘fix’ the case against them by [evidence tampering]” (emphasis added)); Laurie Kindel & Kai Richter, *Spoliation of Evidence: Will the New Millennium See a Further Expansion of Sanctions for the Improper Destruction of Evidence?*, 27 WM. MITCHELL L. REV. 687, 710–11 (2000) (repeatedly warning about the sanctions for evidence destruction and also providing advice on how to prevent seemingly inevitable tampering by the other side).

57. *See* Curriden, *supra* note 52, at 69 (“Perjury is an evasive issue that has been subject to little, if any, formal research. Nor are there adequate statistics on perjury prosecutions and convictions.”); Nesson, *supra* note 12, at 793 (“It is impossible to know precisely how common spoliation is today.”).

58. *Cf.* STEPHEN B. BURBANK, *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 55–72 (1989) (contrasting casual empirical claims about the impact and operation of Rule 11 to actual data for the Third Circuit); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1396 (1994) (questioning empirical evidence on “alleged massive discovery abuse in the federal courts”).

59. Terry R. Spencer, *Do Not Fold, Spindle or Mutilate: The Trend Towards Recognition of Spoliation as a Separate Tort*, 30 IDAHO L. REV. 37, 39 (1993) (“One survey completed by

explain, established that “50% of all litigators found spoliation to be either a frequent or regular problem.”<sup>60</sup>

In fact, Nesson conducted no such survey, let alone in the early 1990s, as the opening lines of his cited article reveal. Although Nesson does cite a similar statistic,<sup>61</sup> his supporting footnote refers the reader to a 1985 article by Professor Rhode.<sup>62</sup> What is more, the statistic that Nesson recites concerns not “spoliation,” but “unfair and inadequate disclosure of material information prior to trial.”<sup>63</sup>

A perusal of the Rhode article confirms that Rhode conducted no such survey either, let alone circa 1985. Instead, Rhode cites to an unpublished manuscript by “S. Pepke” cautiously entitled “Interim Report and Preliminary Findings,” laying out the results—which one must conclude are “preliminary”—of a study conducted circa 1983.<sup>64</sup> Rhode, like Nesson, reports that the survey question concerned “unfair and inadequate disclosure” rather than “spoliation.”<sup>65</sup>

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Harvard Law Professor Charles R. Nesson, concluded that 50% of all litigators found spoliation to be either a frequent or regular problem.” (citing Nesson’s 1991 article, Nesson, *supra* note 12, at 793)); Rivlin, *supra* note 6, at 1001 n.4 (“See Terry R. Spencer, Do Not Fold Spindle or Mutilate . . . (commenting on a survey completed by Harvard Law Professor Charles R. Nesson); Kindel & Richter, *supra* note 56, at 706 (stating that “one survey has found that fifty percent of all litigators now consider spoliation to be either a frequent or regular occurrence,” and citing, without signal, solely to Nesson’s 1991 article); KOESEL ET AL., *supra* note 40, at xiv (supporting the same statistic with only a “see” citation to Nesson’s 1991 article, Nesson, *supra* note 12).

60. Spencer, *supra* note 59, at 39.

61. Nesson, *supra* note 12, at 793.

62. *Id.* at 793 n.1 (citing Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 598–99 (1985)).

63. *Id.* at 793 (quoting Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 598–99 (1985)). The linguistic distinction between “spoliation” and “unfair and inadequate disclosure prior to trial” is potentially significant. Although the term “spoliation” is in some usages broadly defined, neither Rivlin nor Spencer employ a particularly broad definition. See Rivlin, *supra* note 6, at 1004 (defining spoliation as “the failure to preserve property for another’s use as evidence in pending or future litigation”); Spencer, *supra* note 59, at 38 n.4 (adopting a prior author’s definition of “spoliation” as when a person “destroys, mutilates, or alters evidence, and thereby interferes”) (quoting Thomas G. Fischer, Annotation, *Intentional Spoliation of Evidence, Interfering With Prospective Civil Action, as Actionable*, 70 A.L.R. 4th 984, 986 (1989)). Even so, potential differences remain between even the broadest meaning of “spoliation,” on the one hand, and “unfair and inadequate disclosure,” on the other. Plumb the depths of these linguistic distinctions at this point would, nonetheless, be premature—for there were several more switches in this game of telephone.

64. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 599 n.30 (1985) (citing “S. Pepke, Standards of Legal Negotiations, Interim Report and Preliminary Findings (1983) (unpublished manuscript)”).

65. *Id.* at 598.

As it turns out, there is no “S. Pepke” in the legal literature. Further investigation reveals, however, that there is an S. Pepe<sup>66</sup> who did indeed conduct a survey of litigators, and among the “preliminary” findings listed in his “interim report” was something resembling the 50 percent figure that is so frequently cited.<sup>67</sup> Pepe’s results were never published in final form,<sup>68</sup> and his “interim report” leaves unanswered several important questions about how the survey was conducted.<sup>69</sup>

Nonetheless, the “interim report” does make clear that Pepe’s often cited finding was neither about spoliation, as asserted by recent articles, nor about “unfair and inadequate” disclosure, as asserted by both Rhode and Nesson. Rather, the phenomenon that 50 percent of

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66. Typographical errors of this sort, though regrettable, are inevitable and understandable. Whether those who continue to cite this statistic are conducting a reasonable inquiry under the circumstances is open to question.

67. STEVEN D. PEPE, STANDARDS OF LEGAL NEGOTIATIONS: INTERIM REPORT AND PRELIMINARY FINDINGS 3 (1983) [hereinafter PEPE, REPORT] (on file with the *Duke Law Journal*); Steven D. Pepe, Summary of Selected Findings of the Study on the Standards of Legal Negotiations 16 (date unknown) [hereinafter Pepe, Summary] (unpublished manuscript on file with the *Duke Law Journal*). The study was conducted “[i]n conjunction with the American Bar Foundation and the Institute for Social Research at the University of Michigan.” PEPE, REPORT, *supra*, at cover page. The interim report describes itself this way:

The following is a summary of *preliminary* findings of the Study on the Standards of Legal Negotiations. These *preliminary* findings were drawn from responses by 1034 litigation attorneys from the State of Michigan and 1513 from large law firm litigators throughout the country as well as 256 state judges, 75 federal judges, and 128 law professors . . . .

*Id.* at 1. (emphases added).

The focus of the survey was attorney behavior during pretrial *negotiation*, but several questions dealt specifically with discovery itself. The survey consisted of two parts. First, the respondents were asked questions about a hypothetical fact pattern and the ensuing settlement negotiation scenario. Steven Pepe, Standards of Legal Negotiations, Appendix to PEPE, REPORT, *supra* (unpublished manuscript, on file with the *Duke Law Journal*) (questionnaire relating to PEPE, REPORT, *supra*). Second, the respondents were asked general questions about their own experiences regarding, *inter alia*, pretrial disclosure. *Id.* According to the report, the average respondent was a 37-year-old attorney who had spent seven years doing a substantial amount of litigation. PEPE, REPORT, *supra*, at 2.

68. Cf. Steven D. Pepe, *Professional Responsibility in Pretrial Discovery—A Tale of Two Cities*, MICH. B.J., Mar. 1985, at 298, 300 (mentioning the findings only in passing); Steven D. Pepe, *Standards of Legal Negotiations: Interim Report for ABA Commission on Evaluation of Professional Standards and ABA House of Delegates*, in THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION 206–08 (3d ed. 1985) (excerpting Pepe’s interim report and preliminary findings, but not including the result cited by Rhode, *supra* note 64, at 598–99, 599 n.30).

69. For example, there is little information in the interim report on sampling methods and response rates.

Pepe's litigators regarded as a regular or frequent problem was "unfair *or* inadequate disclosure."<sup>70</sup>

The distinction between "and" and "or" is as important as the distinction between "Pepe" and "Pepke." Had half the respondents stated that they found pretrial disclosure regularly or frequently to be both "unfair and inadequate," one could conclude that half found disclosure regularly or frequently to be, *inter alia*, "unfair." If "foul" is the opposite of "fair," then perhaps "unfairness" represents the kind of evidentiary foul play whose prevalence those who cite the statistic mean to establish. But because Pepe's survey respondents were talking about "unfair *or* inadequate," one cannot rule out the possibility that some, or even all of the 50 percent thought that only "inadequacy," and not "unfairness," was a regular or frequent problem.

The difficulty with this, in turn, is that "inadequate" is not a self-defining term. "Inadequate for what?" is the begged question. From what can be gleaned from Pepe's "interim report," each respondent was free to provide her own tacit answer.<sup>71</sup> Some respondents may well have interpreted "inadequate" to mean "inadequate for my opponent to meet the requirements of law" or "inadequate for her to meet her ethical obligations." But some or all respondents might just have meant "inadequate for my side to win the case" or even "inadequate for my side to win without having had to try so hard."

In the end, therefore, perhaps all that can be concluded from this elusive twenty-year-old study—this detached root of the most commonly cited empirical finding on evidence tampering—is that the average attorney circa 1980 would have liked to have known more about her opponent's case.

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70. See PEPE, REPORT, *supra* note 67, at Appendix (containing a copy of the survey questionnaire, which poses the question at issue in the second part); *id.* (describing the two parts of the survey, entitled "Discovery Problems & Negotiations," phrasing the question thus: "In your practice do you experience the problem of unfair *or* inadequate disclosures of material information during pretrial stages of litigation? Seldom if ever, Occasionally, Regularly, Frequently, Not applicable or do not know" [emphasis added]); see also Pepe, Summary, *supra* note 67, at 3 (noting that a majority of litigators in both samples experience unfair *or* inadequate disclosure of information as a regular and commonplace problem).

Note, however, that in the summary discussion in PEPE, REPORT, *supra* note 67, Pepe uses "and" rather than "or" in relation to this question (though, arguably, this choice is not incorrect in the specific context in which it appears). *Id.* at 3 ("When asked about problems of unfair *and* inadequate disclosure of material information pretrial . . . 51% of the [n]ational respondents felt that this was a regular or frequent problem." [emphasis added]). This may help to explain later confusion regarding the actual wording of the questionnaire.

71. See PEPE, REPORT, *supra* note 67; Pepe, Summary, *supra* note 67.

b. *Brazil Survey*. Another frequently cited<sup>72</sup> statistic derives from Professor Brazil's questionnaire-guided interviews of 180 Chicago area litigators in 1979.<sup>73</sup> Based on responses to "open-end questions, plus complaints attorneys volunteered at other times during the interviews,"<sup>74</sup> Brazil reports that 61 percent of his sample "mentioned" the problem of "evasive responses, withholding information, or noncompliance"<sup>75</sup> in connection with discovery.

Brazil's survey was a pioneering effort. Yet, as empirical support for the prevalence of evidence tampering—one of the survey's frequent employments—it has several drawbacks. First, Brazil's aggregate statistics, the only statistics that are cited in the evidence tampering literature, are of questionable value given Brazil's sampling technique. As Brazil explains,

[a]lthough the method used to select the attorneys to be interviewed *would not produce a statistically representative sample* of Chicago litigators, it was *designed to . . . permit comparison* of the attitudes, perception and experiences of *differently situated litigators*.<sup>76</sup>

Brazil's study is perhaps best viewed as a series of parallel surveys, one for each cohort of similarly situated litigators. Even if each cohort taken individually was properly sampled, it would be a mistake to assume that the simple concatenation of these parallel surveys produces a proper sample of the full population. By way of analogy one might properly survey one hundred randomly chosen individuals from each state in order to compare attitudes across states. But simply aggregating these individuals into a sample of five thousand would provide an inaccurate sense of national attitudes. Rhode Island, for example, would be oversampled relative to California.

Second, Brazil's study, like Pepe's, raises serious definitional issues. The phenomenon whose prevalence is surveyed appears to be too broadly and ambiguously defined to distinguish it from the general pursuit of self-interest in pre-trial process. What range of activities is covered by the disjunction, "evasive responses, withholding information, or noncompliance"? What portion of the 61

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72. See, e.g., FED. R. CIV. P. 26 advisory committee's notes to 1983 amendments; Nesson, *supra* note 12, at 793 n. 2; Rivlin, *supra* note 6, at 1004 n.5.

73. Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 790 (1980).

74. *Id.* at 824.

75. *Id.* at 825 fig.14.

76. *Id.* at 791 (emphases added).

percent is attributable to each? Does “withholding information” include failing to volunteer damaging information to the other side? Does an “evasive response” include answering the question precisely as asked, rather than giving the opponent-questioner the benefit of the doubt? Brazil’s own discussion of the definition of “evasion” confirms the breadth of meaning connected to even this single element of his trio.<sup>77</sup>

Brazil’s 61 percent finding regarding “evasive responses, withholding information, or noncompliance” inspires what has become one of the most frequently quoted passages of his article:

[A]mong the lawyering practices targeted for blame, none commanded more negative attention than the redoubtable art of evasion . . . . [I]t would be difficult to exaggerate the pervasiveness of evasive practices or their adverse impact on the efficiency and effectiveness (for information distribution) of civil discovery. Evasion infects every kind of litigation and frustrates lawyers in every kind of practice.<sup>78</sup>

Given that this statement apparently applies not to evasion *per se* but to “evasive responses, withholding information, or noncompliance,” and given the definitional problems with the term “evasion” alone, this is a potentially misleading summary of Brazil’s results. Reattached to the actual survey results that inspired it, this often-quoted excerpt may signify only that litigating parties act strategically within the confines of the rules governing discovery.<sup>79</sup>

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77. *See id.* at 829:

The term “evasion” as used here is incapable of precise definition but embraces several kinds of reportedly widespread practices. The most obvious is the habit of manipulating the definitions of opponents’ words, interpreting their interrogatories, document demands, or deposition questions as narrowly, broadly, or selectively as possible for the purpose of serving a client’s adversarial interests . . . . The term “evasion” also refers to more direct forms of resistance to disclosure, for example, refusing to respond in any way to discovery probes or intentionally withholding some evidence that is clearly sought and discoverable . . . .

In fact, “several attorneys made it clear that evasion, at least in the form of seeking out and taking advantage of ambiguities, oversights, or other errors in the way opponents phrased discovery probes was, so far from being unethical, a clear duty of the responsible advocate.” *Id.* at 838.

78. *Id.* at 828–29 (referring to the 61 percent statistic in his figure 14, *id.* at 825 fig.14).

79. Note also that this finding regarding evasion mostly concerns interrogatories. *See id.* at 829–30. (“Lawyers commonly associated the problem of evasion with interrogatories, the only one of the rule-created instruments of discovery that a sizable number of attorneys (50 of 177; 28 percent) identified by name as a principal source of difficulty.”).

Another finding concerning “evasion” appears elsewhere in the study. Brazil asked lawyers to compare the existing system to a “frictionless system of sharing information in which

When Brazil does ask directly about “lack of candor or bad faith by the opposing party or attorney,”<sup>80</sup> the results are less dramatic. Respondents reported on average that such practices impeded discovery in 14 percent of their cases.<sup>81</sup>

Yet, at the same time, Brazil does provide impressionistic evidence that foul play is far more prevalent than this. He reports, for instance, one litigator’s view that “‘manufacturing evidence for parties is so common it would shock the average person.’”<sup>82</sup> And so, in the end, Brazil’s study, though it fails to provide systematic evidence of tampering, does in effect provide evidence of the juxtaposition between the paucity of firm evidence and the prevalence of firmly held impressions.

c. *Other Studies.* Other empirical research in this area is also problematic. One can still find mention of a study by Arther and Reid in which almost 90 percent of parties in a large sample of paternity suits admitted after trial that they lied under oath when subsequently confronted with a lie detector test.<sup>83</sup> But this study was conducted in 1954. And the very fact that it is still wheeled out to certify the prevalence of perjury in modern process may itself be some indication of the scarcity of contemporary empirical support. Moreover, as is too rarely noted, the study appears to have been sponsored in some

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responding parties made good faith efforts to understand and satisfy the requests of propounding parties.” *Id.* at 834. Brazil finds that every lawyer in his sample stated that “evasive and incomplete” answers had impeded discovery at least once. *Id.* at 835. Arguably, however, this unanimous response is merely the result of his having posed a “frictionless system” as the benchmark.

80. *Id.* at 838. There were also definitional difficulties with “lack of candor.” Brazil reports that the attorney/respondents were not sure whether lack of candor meant “dishonesty” or “evasiveness.” *Id.* In “later interviews” (Brazil does not say what portion) the attorneys were instructed to include just unethical behavior. *Id.*

81. *Id.*

82. *Id.* at 838 n.80; see also *id.* at 855 n.105:

A few attorneys even admitted having [lied]. One said, e.g., that he and a client simply decided not to acknowledge the existence of clearly discoverable information because to do so would have been disastrous for the client’s case . . . . Another attorney intimated that it was not beyond the pale “even [to] lie about temporarily losing a document.”

83. Richard O. Arther & John E. Reid, *Utilizing Lie Detector Techniques to Determine the Truth in Disputed Paternity Cases*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 213, 215 (1954); see Franklin E. Zimring, Commentary, *What Is the Aim of Criminal Law? Is it Selective Prosecution to Deter Wrongdoing or an Inflexible Moral Standard?*, L.A. TIMES, Jan. 14, 1999, at B9 (citing Arther & Reid, *supra*); Robert Cooter & Winand Emmons, Truth-Bonding and Other Truth-Revealing Mechanisms for Courts 2 (Dec. 2002) (unpublished manuscript, on file with the *Duke Law Journal*) (same).

capacity by a company that stood to profit from the general use of lie detector tests.<sup>84</sup>

Beckstein and Gabel's 1980 survey of the ABA's Antitrust Law Section<sup>85</sup> is occasionally cited to support the proposition that evidence destruction is widespread.<sup>86</sup> Respondents were asked to indicate "the frequency with which you encounter [various] compliance practices among corporations."<sup>87</sup> Two of these practices are of interest here.

First, respondents were asked about "policies that reduce historical records."<sup>88</sup> Roughly half said that they had often or always encountered such practices. More than three quarters said they had encountered such practices at least sometimes.<sup>89</sup> As with survey questions posed by Pepe and Brazil, this question seems too broadly worded to support the conclusion that evidence tampering is prevalent. The category "policies that reduce historical records" presumably includes not only last-minute shredding, but also truly routine document management.

Consistent with the possibility that such policies need not qualify as tampering are participants' answers to a second question concerning converse practices. The survey asks about the prevalence of "policies to *preserve* information on intent, sources of competitive information, etc."<sup>90</sup> Here, roughly 30 percent said that they often or always encounter such practices among corporations, while almost 70 percent said that they at least sometimes encounter such practices.<sup>91</sup>

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84. Arther & Reid, *supra* note 83, at 213 (opening with a two-paragraph editor's note detailing the management positions of both authors at John E. Reid and Associates, "an organization specializing in lie detection"); *id.* at 214-15 (indicating that results come from "a six-year study of the 312 disputed paternity cases handled at the Chicago laboratory of John E. Reid and Associates"); *see also* [www.reid.com](http://www.reid.com) (last visited February 26, 2004) (website for John E. Reid and Associates, "established 1947," offering polygraphs services).

85. Alan R. Beckenstein & H. Landis Gabel, *Antitrust Compliance: Results of a Survey of Legal Opinion*, 51 ANTITRUST L.J. 459 (1982).

86. *See, e.g.*, Solum & Marzen, *supra* note 38, at 1183 & n.418 (citing the Beckenstein & Gabel study in support of the proposition that "[t]he routine destruction of documents, often accomplished through formal 'document management' programs, has become commonplace").

87. Beckenstein & Gabel, *supra* note 85, at 489.

88. *Id.* at 493.

89. *Id.*

90. *Id.* (emphasis added).

91. *Id.* To be sure, careful empirical research in the broad area of litigation has flourished over the last two decades. Yet, this has benefited the analysis of evidence tampering only indirectly. Most of the attention has been focused on proving, disproving, or qualifying the claim that the costs of pretrial discovery—incurred legitimately or otherwise—are disproportionate to what is at stake in most litigation. *See, e.g.*, James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 B.C. L. REV. 613, 636



3. *Summary.* On the issue of whether legal process is ablaze with evidentiary foul play, any attempt at metanalysis is largely abortive. Studies by Pepe, Brazil, and others laid aside, no results appear to survive preliminary screening, leaving nothing to synthesize. At the same time, an informal “survey” of statements in the legal literature regarding the prevalence of evidentiary foul play is unusually conclusive. It appears to be as difficult to find a commentator who thinks evidence tampering is under control as it is to find systematic empirical evidence confirming its ubiquity.

*B. Is the Law Fiddling?*

Although commentators are in accord that evidence tampering is commonplace<sup>92</sup> and that this is a lamentable state of affairs,<sup>93</sup> they do

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(1998) (finding that the “parade of horrors” that dominates the debate over discovery is confined to a minority of cases); Thomas E. Willging et al., *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998) (“[F]or most cases, discovery costs are modest and perceived by attorneys as proportional to parties’ needs and the stakes in the case.”). These researchers did occasionally ask about foul play, but not in a way that confirms or dismisses anecdotal evidence on the topic. For example, in studying the efficacy of mandatory disclosure under Federal Rule of Civil Procedure 26, one study found that “lawyers report that when disclosure is done on a mandatory basis, it is full disclosure for 50% of the cases and pro forma disclosure for the remaining half of the cases.” Kakalik et al., *supra*, at 679. With regard to requests for the production of documents and things under Federal Rule of Civil Procedure 34, another study found that:

[D]ocument production . . . is the activity for which the highest percentage of attorneys reported problems in their case (44%). The most frequently reported problems with document production were failure to respond adequately (28% of those who engaged in document production) and failure to respond in a timely fashion (24%).

Willging et al., *supra*, at 540.

92. See *supra* Part I.A.1.

93. See Nesson, *supra* note 12, at 793 (“Spoliation is an effective, and, I believe, a growing litigation practice which threatens to undermine the integrity of civil trial process. It is a form of cheating which blatantly compromises the ideal of the trial as a search for truth.”); Nolte, *supra* note 56, at 353 (“Destruction or spoliation of evidence in civil litigation has undermined the integrity of the adversary system, thus raising serious public policy concerns.”); Oesterle, *supra* note 12, at 1188 (“[E]xisting laws on the consequences of document destruction are too lenient. The standards defining illegal destruction are too permissive, and the penalties attaching to illegal acts are largely toothless.”); Solum & Marzen, *supra* note 38, at 1086 (“[T]he strict controls being developed by many courts are justified. In particular, truth and fairness to litigants support restrictions on evidence destruction even though the inefficiency of wide-ranging document preservation and concern for individual rights and privacy suggest boundaries beyond which destruction of evidence should not be controlled.”); Harris, *supra* note 12, at 1779–1802 (arguing for the need to revamp the legal system’s approach to perjury, discussing the reasons why perjury has been able to “infect the system of justice,” and finding the reason to be that its “contagion has gone unchecked”).

not always agree on what aspect of the legal system is to blame. Some emphasize the leniency of the rules as written—including the relevant criminal statutes, procedural rules, evidentiary rules, and codes of professional responsibility.<sup>94</sup> Others fault the lack of enforcement by prosecutors,<sup>95</sup> judges,<sup>96</sup> and attorney disciplinary boards.<sup>97</sup> Ultimately,

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94. See Oesterle, *supra* note 12, at 1188 (arguing that “existing laws on the consequences of document destruction are too lenient”). But see Nesson, *supra* note 12, at 806 (“I do not believe that the remedy to the problem is to strengthen and clarify the rules. Existing rules are more than adequate . . . . From reading the rules of discovery, one would think that spoliation is a question the law has taken very seriously.”).

95. See GORELICK ET AL., *supra* note 12, § 5.1, at 170 (“[C]riminal convictions have been obtained only for destruction of evidence pertinent to criminal proceedings, not civil actions, and then only for selective rather than routine destruction.”); KOESEL ET AL., *supra* note 40, at 69 (noting that limited prosecutorial resources prevent prosecution of spoliation in private lawsuits); Kindel & Richter, *supra* note 56, at 700 (“[T]he threat of criminal prosecution for spoliation of evidence in the civil arena appears to be more theoretical than real . . . . [given] no reported criminal convictions [arising from] civil litigation.”); Oesterle, *supra* note 12, at 1202–03 (“Either private parties do not complain . . . or federal prosecutors do not prosecute those complaints that are reported.”); Solum & Marzen, *supra* note 38, at 1106 (“The threat of criminal prosecution for evidence destruction in civil litigation . . . appears to be more theoretical than real. Our research revealed no criminal convictions for destroying evidence in civil litigation. Indeed, we have discovered only one reported government investigation of document destruction in a private lawsuit.”); Uviller, *supra* note 54, at 813 n.84:

Not only are witnesses rarely prosecuted for perjury, but criminal defendants are virtually exempt (which they doubtless know). . . . [I]f a defendant is acquitted, only the most vindictive prosecutor will take a second shot at proving his lost cause by the perjury route. The barrier is not the Double Jeopardy Clause, but rather the prudent balance of discretion and valor.

Kristin Adamski, Comment, *A Funny Thing Happened on the Way to the Courtroom: Spoliation of Evidence in Illinois*, 32 J. MARSHALL L. REV. 325, 346 (1999) (“[T]here are no cases where a party was criminally convicted for the spoliation of evidence in civil litigation.”); Harris, *supra* note 12, at 1777 (suggesting that despite “severe regulations . . . few [perjury] offenders . . . are ever punished”). But see Richard F. Ziegler & Seth A. Stuhl, *Spoliation Issues Arise in Digital Era*, NAT’L L.J., Feb. 16, 1998, at B9 (“It’s not easy to go to jail because of discovery abuse in civil litigation, but it can happen.”).

96. See Nesson, *supra* note 12, at 806–07:

[I]n practice, judges are extremely reluctant either to expose discovery violations or to punish discovery violations once exposed, applying the rules instead in ways that minimize or avoid the problem . . . . Whatever the motivation, the resulting judicial behavior sends a message to every litigator: the rules against spoliation will not be seriously enforced.

Uviller, *supra* note 54, at 813 n.84 (“Not only are witnesses rarely prosecuted for perjury, but criminal defendants are virtually exempt (which they doubtless know). If convicted, their fruitless perjury may induce some judges to add a small increment to their . . . sentence . . . .”). But see GORELICK ET AL., *supra* note 12, § 3.1, at 66 (citing approximately fifty cases as evidence that “discovery sanctions are fast emerging as an effective tool against inappropriate destruction of evidence”).

97. See Oesterle, *supra* note 12, at 1219 (“[V]ery few charges are brought and few convictions are obtained against lawyers who counsel or assist clients in the illegal destruction of documents.”); Harris, *supra* note 12, at 1770:

however, this too has been a battle of competing impressions. As with the question of whether evidence tampering is commonplace, the question of what the law does to address the problem has been the subject of little systematic empirical analysis.

This is not to say, of course, that statistics are rarely deployed. The public debate surrounding President Clinton's impeachment is a case in point. For a brief time, the lax enforcement of perjury became newsworthy.<sup>98</sup> The *New York Times* and other news outlets began reporting that in 1997 only about ninety of the nearly fifty thousand filed felony cases—roughly .2 percent—were on charges of perjury.<sup>99</sup>

But then the news pendulum swung the other way, and the possibility that *these* claims were exaggerated became the story.<sup>100</sup> The

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In spite of the frequency with which lawyers are admittedly involved in perjury, formal complaints against attorneys for perjury or suborning perjury filed by state attorney disciplinary boards represent only a fraction of the annual charges filed against attorneys. For example, in Michigan, from the years 1982 through 1994, of approximately 2,700 formal complaints filed by the grievance administrator against attorneys, only seven involved attorney perjury or suborning of perjury.

(footnotes omitted).

This regularity may not apply to sitting lawyer/presidents acting as private litigants. In addition to facing sanctions under the discovery rules, President Clinton was suspended from the Arkansas Bar for five years and was fined \$25,000. See ROTUNDA, *supra* note 2, § 55-1, at 772-73 (stating that, under some circumstances, "a lawyer may be disciplined for wrongful conduct even though she was not acting in her capacity as a lawyer while she was engaging in the wrong").

98. See Dennis Cauchon, *Perjury Charges Rarely Brought in Civil Cases*, USA TODAY, Jan. 29, 1998, at 5A ("Kenneth Starr can indict former White House intern Monica Lewinsky for perjury if there is evidence that she lied in a civil case. But, in practice, such prosecutions are so rare that bringing charges would raise questions of whether Lewinsky had been unfairly singled out for prosecution."); *id.* ("(Perjury) charges are brought very, very, very infrequently in these types of cases." (quoting Ronald Woods, a defense attorney and former U.S. attorney in Houston)); Mansnerus, *supra* note 56. ("[L]egal experts agree that in ordinary civil suits, lying is rampant and prosecution for lying is rare. There have been at most a few dozen published court decisions over the last decade that concern perjury and civil cases, though the total number of prosecutions could be considerably higher.").

99. See Cauchon, *supra* note 98 ("In 1996, only 86 of the 42,436 criminal defendants convicted in federal court were found guilty of perjury, encouraging perjury or bribing a witness, according to U.S. Sentencing Commission statistics."); William Glaberson, *Testing of a President: Legal Issues; In Truth, Even Those Little Lies Are Prosecuted Once in a While*, N.Y. TIMES, Nov. 17, 1998, at A1. ("One statistic on perjury prosecutions has been widely circulated since the President's supporters began arguing that perjury was little more than a technicality seized upon by his enemies: Of 49,655 cases filed by Federal prosecutors last year, only 87 were for perjury."). For the most recent federal statistics on perjury, contempt, and obstruction, see BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2000 (2002).

100. Compare Ruth Marcus, *Paying the Price for Civil Perjury: Prosecution May Be Unusual, but It Can Mean Prison*, WASH. POST, Mar. 3, 1998, at A4 (challenging "any of the pundits on the air to find . . . a case of civil perjury that has been pursued criminally at the

*New York Times* itself reported that, however rare perjury prosecutions might be in federal court, they were markedly less rare in state court.<sup>101</sup> The *Times* supported this claim with the statistic that in California in 1997, there had been 4,318 “perjury prosecutions” out of 326,768 “felony prosecutions” (or about 1.3 percent, six times the .2 percent in the federal criminal system).<sup>102</sup> This California statistic was then picked up by the House’s Impeachment Trial Manager, Representative Stephen E. Buyer (R-Ind.), who presented it with great aplomb in advancing the House’s case against the President before the Senate.<sup>103</sup>

One can confirm that around 4,318 *arrests* in 1997 in California were coded as “perjury,”<sup>104</sup> and that this was out of a total of 326,768 felony arrests for the state.<sup>105</sup> And thus perjury arrests would appear to be more common in California than in the federal system. What was not reported, however, is that the percentage of these cases that led to *conviction* in California is notably lower—lower than in the

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federal level in the last 100 years” (quoting William H. Ginsburg, NBC’s “Today”), *with id.* (taking up Ginsburg’s challenge and noting that “[a] cursory computer search of federal court records turned up more than twenty-five cases of federal prosecutions for perjury in civil cases—and that does not include prosecutions that went forward but did not result in a written opinion by the court”).

101. See Glaberson, *supra* note 99 (looking at perjury prosecutions in both the federal and state systems).

102. *Id.* The *New York Times* also reported 395 New York state “perjury cases” but did not provide statistics on the total number of felony prosecutions in that state. *Id.* Data from no other state was reported.

103. See 145 CONG. REC. S281, S284 (daily ed. Jan. 16, 1999) (statement of Rep. Buyer, House Manager) (“In State jurisdictions all across the country, they take [perjury] very seriously. I have chosen one State, the State of California, which brought 4,318 perjury prosecutions in 1997.”). No other state data is cited. The source of the statistic does not appear in the record.

104. In 1997 there were 4,313 arrests for which a violation under CAL. PENAL CODE § 118 (West 2003) (“Perjury defined”) was the major offense and in which a final disposition was reported and processed in that year. E-mail from anonymous individual at the Criminal Justice Statistics Center, California Department of Justice, to Chris W. Sanchirico, Professor of Law, Business, and Public Policy, University of Pennsylvania Law School and Wharton School (Oct. 10, 2002) (on file with the *Duke Law Journal*) (basing its statistics on numbers extracted from the Offender-Based Transaction Statistics system for the year 1997). See *infra* note 108 and accompanying text for the discussion of data limitations.

105. E-mail from anonymous individual at the Criminal Justice Statistics Center, California Department of Justice, to Chris W. Sanchirico, Professor of Law, Business, and Public Policy, University of Pennsylvania Law School and Wharton School (Oct. 9, 2002) (on file with the *Duke Law Journal*) (“The Adult Felony Arrest Disposition file shows a total count of 326,768 dispositions in 1997. This matches the number stated in [Glaberson’s] article, however, *it is not the number of ‘felony prosecutions.’ We are not able to provide a count on the number of felony prosecutions.*” (emphasis added)).

federal system, and lower in comparison to other adult felonies in California. Of the roughly 4,318 perjury arrests in California in 1997, less than 500 (12 percent) resulted in conviction.<sup>106</sup> In comparison, of all 326,768 California adult felony arrests, 221,808 (67 percent) led to conviction.<sup>107</sup> Consequently, though it may be true that the proportion of perjury arrests in California (1.3 percent) is six times larger than in the federal system, the percentage of all perjury convictions is about the same across the two systems (.2 percent).

Yet the more important and general point is that the precise meaning of these kinds of arrest, prosecution, and conviction numbers is far from clear. In the first place, such statistics typically show only the number of defendants for whom perjury (and/or obstruction) was the “most serious offense” charged, prosecuted, or proven, a coding convention with uncertain but potentially significant effects on the reported frequency of perjury charges and convictions.<sup>108</sup> Consider, for example, that this coding rule forms part of the explanation for California’s relatively large number of perjury arrests as well as its relatively small percentage of perjury convictions. Most of the 4,000 or so perjury arrests in California in 1997 derived from a single county’s idiosyncratic practice of adding perjury charges to welfare fraud charges.<sup>109</sup> Perjury charges carry the longer sentence and so these welfare cases were coded as perjury in the “charges” database. Typically, prosecutors in this county would then drop the perjury charges and conviction would follow only on welfare fraud.<sup>110</sup>

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106. See E-mail from anonymous individual, *supra* note 104. These numbers concern CAL. PENAL CODE § 118 (“Perjury defined”), and data limitations apply. See *infra* note 108 and accompanying text.

107. Table 6: *Final Law Enforcement, Prosecution and Court Dispositions of Adult Felony Arrests by Type of Disposition Statewide*, CJSC Statistical Tables Site, at [http://justice.hdcdojnet.state.ca.us/cjsc\\_stats/prof00/00/6.htm](http://justice.hdcdojnet.state.ca.us/cjsc_stats/prof00/00/6.htm) (last visited Nov. 6, 2003) (on file with the *Duke Law Journal*).

108. This is true of both the federal numbers and the California numbers. See BUREAU OF JUSTICE STATISTICS, *supra* note 99, at 107–08 (“Where more than one offense is charged or adjudicated, the most serious offense . . . is used to classify offenses.”); DIV. OF CAL. JUSTICE INFO. SERVS., CAL. DEP’T OF JUSTICE, CRIME & DELINQUENCY IN CALIFORNIA 168 (2001), available at <http://caag.state.ca.us/cjsc/publications/candd/cd01/appn.pdf> (on file with the *Duke Law Journal*) (“If a person is arrested for multiple offenses, OBTS selects only the most serious offense . . .”).

Another related problem with the California numbers specifically is that they count “perjury” only and not also “obstruction of justice.”

109. Telephone Interview with anonymous individual at the Criminal Justice Statistics Center, California Department of Justice (Nov. 22, 2002).

110. *Id.*

The second general problem with these statistics is that they provide no information on whether the coded offense arose in a civil trial among private parties, a civil trial in which the government was a party, or a criminal trial. Anecdotal evidence suggests that there are large differences across these three types of cases: although prosecutors themselves may pile on or follow up with a perjury indictment in a case in which they were already involved,<sup>111</sup> they will rarely respond to complaints from private parties.<sup>112</sup> If so, averaging over these various settings serves to exaggerate the threat of perjury and obstruction charges in private party litigation.

Thirdly, the comparison of process crimes with primary activity crimes is fraught with difficulty. Crimes like perjury and obstruction arise from the operation of a system meant chiefly to adjudicate primary activity behavior. Perhaps the relative rarity of perjury and obstruction in criminal process merely reflects the fact that the “crime opportunities” for this derivative crime are only a fraction of the opportunities to commit primary activity crimes and wrongs—a fraction roughly equal to the number of primary activity decision points that end up generating litigation. If this is the case, perjury and obstruction may not be as relatively underenforced as such comparisons make them seem.

Fourthly, even if one could find the right benchmark and establish that, relative to that benchmark, the number of perjury arrests, prosecutions, and convictions were “low,” it is unclear what this would say about enforcement. A small number of arrests, prosecutions, and convictions for perjury is consistent with both rampant perjury due to lax enforcement and tight enforcement leading to very little perjury. Without also knowing how often crimes like perjury are committed, knowing how often such crimes are

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111. See Oesterle, *supra* note 12, at 1204:

If a section 1503 [obstruction of justice] offense occurs in the context of a pending federal criminal trial, the prosecutor (after going back to the grand jury, of course) just adds, in essence, another count to the existing indictment. The fact that the prosecution had begun on other charges signals that convicting the defendant is a high priority and, perhaps, that the defendant has a history of criminal activity. The new section 1503 [obstruction of justice] charge provides another round of ammunition for the prosecutor in the plea bargaining process.

*But see* Uviller, *supra* note 54, at 813 n.84 (“[O]nly the most vindictive prosecutor will take a second shot at proving his lost cause by the perjury route.”).

112. See Oesterle, *supra* note 12, at 1188. (“[P]rivate litigants have limited recourse against those who engage in unlawful destruction; public prosecutors, however, may initiate or threaten a range of prosecutions with criminal and civil penalties.”).

punished tells us little about the chance that any given commission will be punished.

Lastly, even if one could reliably determine that the chance of arrest, prosecution, or conviction was low, one could not conclude from this that the impact of these laws on behavior was insignificant. As is well understood, the law's effect on behavior is not just a factor of how frequently transgressions are detected, but also how severely they are punished.<sup>113</sup> In fact, the Federal Sentencing Guidelines punish perjury and obstruction rather severely—a first time offender serves no less than ten months in prison.<sup>114</sup> The incremental impact of this prison time on the well-being of the average contract or tort litigant is likely to be large relative to the stakes of the underlying suit, especially considering the potential damage to reputation and earning power. According to a *Washington Post* headline from the time of President Clinton's impeachment, "Prosecuting Civil Perjury Is Unusual, but It Can Mean Prison."<sup>115</sup> It is hard to say whether reading this would have deterred or encouraged the average civil litigant.

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113. See generally JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 325 (1931) (identifying the trade-off between the probability of the detection and the severity of the punishment); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 179–80 (1968) (analyzing the implications of the aforementioned trade-off for optimal criminal enforcement).

114. As of this writing, the base offense level for obstruction (as for perjury) under the Federal Sentencing Guidelines is still twelve, which roughly means imprisonment from ten to sixteen months for a first-time offender and perhaps also fines ranging from \$3,000 to \$30,000 (for individual defendants). U.S. SENTENCING COMM'N, *FEDERAL SENTENCING GUIDELINES MANUAL* §§ 2J1.2–.3, 5E1.2 (2001); *id.* ch. 5 pt. A.

Several additional points regarding sentencing are in order. First, section 805 of the Sarbanes-Oxley Act directs the United States Sentencing Commission to "review and amend, as appropriate" the sentencing provisions relating to obstruction of justice. Sarbanes-Oxley Act of 2002 § 805, 15 U.S.C.A. § 994 note (West Supp. 2003); see also *id.* § 1104(b)(4), 15 U.S.C.A. § 994 note (requesting that the Sentencing Commission "ensure that guideline offense levels . . . are adequate"). Second, the offense level for conviction of another nonobstruction offense may be increased by two if the defendant obstructed the investigation, prosecution, or sentencing of that offense. UNITED STATES SENTENCING COMM'N, *supra*, § 3C1.1. Third, if, based on a single knowing, material lie stated under oath in federal district court, a defendant is convicted of both perjury under 18 U.S.C. § 1623 (2000) and obstruction under 18 U.S.C.A. § 1512(c) (West Supp. 2003), these two counts would likely be grouped together resulting in an overall offense level of twelve for the single lie. *Id.* §§ 3D1.1–.2. It is also possible that several lies told to the same court in the same case, and to the same end, would also be grouped in this fashion. *Id.* Fourth, the sentencing judge has some authority to deviate from the guidelines.

115. Marcus, *supra* note 100.

*C. Forced Assessment*

Given the paucity of hard data, the hypotheses that evidence tampering is commonplace and that the regulation thereof is lax would probably be rejected in any systematic metanalysis<sup>116</sup> of existing data. But the rejection of a hypothesis in careful empirical work does not imply the acceptance of its opposite; the hypothesis that tampering is not commonplace and that the law is not lackadaisical would probably also be rejected.<sup>117</sup>

Suppose, however, that principled agnosticism is not an option. Imagine that we find ourselves in a position analogous to that of the umpire at home plate—for whom concluding that the runner's slide kicked up too much dust to make the call at a 95 percent confidence level, or making a principled plea for "more and better empirical work on the play" would be inappropriate responses.

We might consider the possibility that impressionistic evidence—though unreliable in general—may be conveying at least some real information in this case. Although an isolated anecdote is little more than an illustration of what it would be like for a proposition to be true, a sizable collection of anecdotes is not so far from a survey. The chief similarity is that in both cases many individuals communicate their impressions of the world. The chief differences (at least with regard to a carefully conducted survey) are three. First, the survey produces a more uniform set of responses by asking all subjects the same question which all respondents interpret in the same way. Second, the survey is more careful about selecting a representative sample. Third, because survey questions can be framed in terms of personal knowledge, the survey has a somewhat better chance of avoiding "herding" behavior, wherein several seemingly independent impressions derive in reality from a unitary source. These distinctions are likely to make a large difference when one is "averaging" over anecdotes that point in many different directions, or when there is reason to believe that only those who witness what they regard as notable behavior come forward with their impressions. But when, as here, the anecdotal evidence is, and has been for some time, relatively

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116. A metanalysis quantitatively combines the results of prior studies meeting express criteria. See, e.g., R. Rosenthal & M. R. DiMatteo, *Meta-analysis: Recent Developments in Quantitative Methods for Literature Reviews*, 52 ANN. REV. PSYCH. 59 (2001) (primer on meta-analysis).

117. See generally MORRIS H. DEGROOT, PROBABILITY AND STATISTICS 437–517 (2d ed. 1986) (discussing statistical techniques for testing hypotheses).



broad-based and remarkably aligned, the impact of these distinctions may be somewhat attenuated.

In reviewing the literature over the last two decades, one is struck by the fact that apparently no one—no judge, no plaintiffs’ attorney, no defense counsel, no client—is waxing eloquent on the sanctity of trial evidence: nobody, apparently, is “drowning” in litigant integrity. This regularity would convey less information were our attention restricted to the first wave of reporting, when the opposite belief that “things are going reasonably well” might not have been worth mentioning. But the persistence of this unanimity is telling. Despite the fact that it would have been at several points in recent history newsworthy, scholarship-worthy, and in the political interests of those whose voices generally command attention, the optimistic view of evidentiary foul play has never surfaced.

In the end, then, if we had to make the call—which arguably, we do whenever we decline to privilege the status quo—we could perhaps feel reasonably secure in concluding that evidence tampering is not uncommon and that the law, though it does not ignore the activity, does at best a halfhearted job of preventing it. This is the provisional position adopted in the remainder of the Article.

## II. THE LAW’S MYOPIC FOCUS: DOCTRINE

Scholars may disagree about whether the prevalence of evidence tampering is a result of how the law is written or how it is enforced.<sup>118</sup> There is general consensus, however, that the law as written is the source of the second potentially troubling aspect of tampering regulation considered in this Article—namely, that it is too tightly focused on tampering that occurs far downstream along the litigation flow.<sup>119</sup>

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118. See *supra* notes 94–97 and accompanying text.

119. See Oesterle, *supra* note 12, at 1194–96 (advocating moving back the date on which evidence destruction actions can be brought); *id.* at 1195 (“[L]itigants apparently can destroy relevant documents on the eve of the filing of a civil action. Most lawyers appear to use this standard as a general rule of thumb when advising clients who are parties to, or are facing, civil litigation.”); Philip A. Lionberger, Comment, *Interference with Prospective Civil Litigation by Spoliation of Evidence: Should Texas Adopt a New Tort?*, 21 ST. MARY’S L.J. 209, 230–31 (1989) (“Currently, spoliators may escape criminal or civil sanctions by destroying evidence before the institution of legal proceedings.”); Andrea H. Rowse, Comment, *Spoliation: Civil Liability for Destruction of Evidence*, 20 U. RICH. L. REV. 191, 193 (1985):

[U]nder some statutes an individual may escape criminal liability where evidence is destroyed before a legal proceeding is instituted, even though the spoliator reasonably believed a legal proceeding or investigation was likely to arise. Because of

The rules governing evidence tampering span several fields of legal scholarship. These rules are notoriously unsettled and their application across jurisdictions varies widely—a disequilibrium that may reflect infrequent employment.<sup>120</sup> The discussion that follows considers those laws and rules that apply in civil actions among private parties in federal court (although some discussion of agency investigations is unavoidable). The focus is on rules that increase the legal risk of evidence tampering, as opposed to those that make tampering more difficult to effect (e.g., those facilitating impeachment of witnesses). Furthermore, the discussion concentrates on manifestations of the law's downstream focus in this area, putting aside a host of other interesting issues (many of which are already well handled in existing scholarship).<sup>121</sup>

The structure of these statutes and rules confirms the impression that only downstream evidence tampering is subject to sanction. Moreover, even within the limited downstream reaches where these rules apply, one detects a sliding scale: the farther downstream the activity, the toothier the proscription.

#### A. *Criminal Statutes*

Statutes criminalizing evidentiary foul play fall into three overlapping categories: obstruction of justice, criminal contempt, and perjury.<sup>122</sup>

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these statutory loopholes, many lawyers believe they can legally and ethically advise their clients to destroy evidence.

120. Apparently the Peter Pan of evidentiary procedure, the law in this area has been deemed “immature” for almost seventy-five years. See John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 230 (1935) (“[A]s a whole the published opinions are most unsatisfactory. After reading some scores of them, we concluded that any ‘collection of the authorities’ would be an uninformative hodge-podge.”); Beckstrom, *supra* note 12, at 690 (writing in 1966: “Unfortunately, there are few interpretive cases that are closely enough related to our specific problems to be of much assistance. Through this foggy bog the antitrust lawyer must make his way . . . .”); Oesterle, *supra* note 12, at 1231 (writing in 1983: “At present, the standards imposed by courts that have gone beyond the language of rule 37 are immature.”); Joseph V. De Marco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. REV. 570, 570–71 (1992) (“[T]he mens rea requirement has never been clearly articulated.”).

121. See generally GORELICK ET AL., *supra* note 12; Beckstrom, *supra* note 12; Nesson, *supra* note 12; Oesterle, *supra* note 12.

122. For an analysis of when such “public remedies” might be preferable to procedural and evidentiary sanctions or independent tort claims, (discussed *infra* in Parts II.B and II.C, respectively), see Richard D. Friedman, *Dealing with Evidentiary Deficiency*, 18 CARDOZO L. REV. 1961, 1980–81 (1997).

1. *Obstruction of Justice.* The twenty statutes in Title 18's Chapter 73<sup>123</sup>—which reach activities as diverse as destroying, altering, and fabricating documentary evidence; lying to juries, agencies, and investigators; and violently retaliating against judge, jury, or witness—are scattered like leaves over the landscape of evidentiary foul play, overlapping here, leaving patches of green there.<sup>124</sup> In the wake of Enron's collapse and the conviction of its auditor, Arthur Andersen, for obstruction of justice,<sup>125</sup> Congress tossed a few new leaves onto the turf. Precisely where these landed is unclear. Their legislative history is particularly hard to discern, shadowed as they were by auditing and securities reforms contained in the same Sarbanes-Oxley Act.<sup>126</sup>

Arguably, however, Sarbanes-Oxley did little to widen the law's tight focus on downstream tampering.<sup>127</sup> The dual object of this Section is to support this claim, while also generally elucidating how obstruction statutes govern tampering in private suits.

a. *The Pre-Sarbanes-Oxley Problem.* Much simplified, the score of obstruction statutes in Chapter 73 vary in scope along three dimensions: (1) the genre of "obstructive" act proscribed; (2) the form of "justice" that is obstructed (e.g., judicial proceeding, agency investigation, or congressional hearing); and (3) the degree of causal and intentional linkage—i.e., the "nexus"—between the "obstruction," on the one hand, and the "justice," on the other.<sup>128</sup>

Before Sarbanes-Oxley, the most criticized aspect of Chapter 73 was the fact that many obstructive acts were not criminal unless they were specifically directed at a pending judicial or agency

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123. 18 U.S.C.A. §§ 1501–1520 (West Supp. 2003).

124. See Beckstrom, *supra* note 12, at 704 (referring to Chapter 73 as a "motley collection" of statutes).

125. Arthur Andersen, LLP was convicted under 18 U.S.C. § 1512(b) (2000). Luisa Beltran et al., *Andersen Guilty*, CNN Money, at [http://money.cnn.com/2002/06/13/news/andersen\\_verdict](http://money.cnn.com/2002/06/13/news/andersen_verdict) (June 16, 2002) (on file with the *Duke Law Journal*).

126. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.A. (West Supp. 2003)). The relevant titles of this act are Title VIII ("Corporate and Criminal Fraud Accountability") and Title XI ("Corporate Fraud and Accountability").

127. That Congress went so far as to crack open Chapter 73 and yet did little to correct its supposedly myopic focus may be instructive, but we will leave that possibility for the analysis in Part IV.

128. The "nexus" requirement is actually the conjunction of elements that are sometimes treated separately. See, e.g., De Marco, *supra* note 120, at 572 (listing four elements, including pendency and specific intent).

proceeding.<sup>129</sup> More precisely, the provisions of Chapter 73 with an adequately broad definition of “obstruction” had an overly strict nexus requirement, while those with a relaxed nexus requirement had a too narrow definition of “obstruction.”

Thus, on the one hand, section 1503(a)’s “omnibus provision”<sup>130</sup>—with its broad scope relative to different *forms* of obstructive activity—had (and still has) a strict nexus requirement. The *Aguilar* case,<sup>131</sup> specifically held out as an example of the need for reform by the Senate sponsor of the new obstruction provisions, illustrates the point.<sup>132</sup> Aguilar, a federal district judge, lied to Federal Bureau of Investigation (FBI) investigators about his improper efforts to influence the outcome of a case being handled by another judge in his district. For these lies, he was charged under section 1503(a)’s omnibus provision with “corruptly endeavoring” to obstruct a grand jury investigation.<sup>133</sup> At the time that he was questioned by the FBI, a grand jury had convened to investigate his influence activities, and Aguilar apparently knew of this fact.<sup>134</sup> But the FBI agents to whom he lied had not been subpoenaed to appear before this grand jury and were not “act[ing] as an arm of the grand jury.”<sup>135</sup> The Supreme Court held that there was not a sufficiently significant “nexus” between Aguilar’s obstructive act and the kind of justice protected by 1503(a)’s omnibus provision: “[U]ttering false statements to an investigating agent . . . who might or might not

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129. See *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (finding that the defendant’s false statements to the investigating agent were not covered by the statutory language because the agent “might or might not” testify before a grand jury); Oesterle, *supra* note 12, at 1201–02 (“[S]ection 1503 apparently allows parties to destroy any documents, even those relevant to future civil actions, if the destruction occurs before the complaint is filed.” (referring to 18 U.S.C. § 1503 (2000))). But see *Solum & Marzen*, *supra* note 38, at 1111–12 (arguing more on the basis of logic than case law that obstructive acts perpetrated prior to a grand jury subpoena or civil complaint may be criminal under section 1503).

See *infra* notes 162–171 and accompanying text for a discussion of how recent changes to Chapter 73 would apply to the facts in *Aguilar*.

130. Section 1503(a)’s omnibus provision applies to “[w]hoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.” § 1503(a).

131. *Aguilar*, 515 U.S. at 593.

132. See 148 CONG. REC. S1786 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy).

133. *Aguilar*, 515 U.S. at 599.

134. See *id.* at 597, 600–01 (noting that when Aguilar asked the FBI agent whether he was a target of a grand jury investigation, the agent told him there was a grand jury convening).

135. *Id.*

testify before a grand jury is [in]sufficient to make out a violation of the [omnibus] provision of § 1503.”<sup>136</sup>

On the other hand, several other sections of Chapter 73 requiring less of a nexus were seen as too narrow in their definition of “obstructive acts.” Chief among these other sections was (former) section 1512.<sup>137</sup> Unlike section 1503, section 1512 did not (and still does not) require that the obstructed form of justice—the “official proceeding”<sup>138</sup>—be “pending or about to be instituted at the time of the offense.”<sup>139</sup> Yet, although section 1512 applied to “corruptly persuading” *another* to lie, mislead, destroy, or conceal, it did not apply to one’s *own* such acts.<sup>140</sup>

*b. The Sarbanes-Oxley Solution.* Congress’s apparent object in passing Sarbanes-Oxley’s obstruction provisions was to combine section 1503(a)’s broader definition of obstructive acts with section 1512’s weaker nexus requirement.<sup>141</sup> The House had one idea about

136. *Id.*

137. 18 U.S.C. § 1512 (2000) (criminalizing, prior to Sarbanes-Oxley, an array of specific forms of obstruction, including killing or threatening witnesses and, by threats or other means, inducing another person to destroy evidence).

138. The phrase “official proceeding” in section 1512 was and is defined in section 1515(a)(1) as follows:

(A) a proceeding before a judge or court of the United States, a United States magistrate, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury; (B) a proceeding before the Congress; (C) a proceeding before a Federal Government agency which is authorized by law; or (D) a proceeding . . . before any insurance regulatory official or agency . . . .

18 U.S.C. § 1515(a)(1) (2000). Thus, in addition to its weaker nexus requirement, section 1512 also applies to a broader range of “justice” than section 1503(a), a point not emphasized in the text. (Note also: not all provisions in section 1512 require that the justice obstructed be an “official proceeding,” as defined in section 1515(a)(1)).

139. 18 U.S.C. § 1512(e)(1). Nor did (or does) section 1512 require that the obstructer know or intend his acts to be directed specifically to a *federal* court, grand jury, or investigation. *Id.* § 1512(g).

140. *See, e.g.,* United States v. Poindexter, 951 F.2d 369, 383 (D.C. Cir. 1991) (noting that “neither the bill that passed the House nor the compromise bill that was ultimately enacted criminalizes a witness’s violation of his own legal duty”).

141. According to Senator Leahy, the sponsor of some of these provisions, the changes to Chapter 73 were meant “to clarify and plug holes in the existing criminal laws relating to the destruction or fabrication of evidence, including the shredding of financial and audit records” because “[c]urrently, those provisions are a patchwork which have been interpreted, often very narrowly, by Federal courts.” 148 CONG. REC. S1786-6 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy). Leahy specifically mentions *Aguilar*’s nexus requirement and section 1512’s inapplicability to one’s own acts. *See id.*

how to do this, the Senate, another.<sup>142</sup> Rather than melding the two approaches into a coherent whole, the conference report simply adopted both approaches,<sup>143</sup> thus making Chapter 73's "medley of crimes"<sup>144</sup> all the more cacophonous.

The House's approach, which has received less attention than the Senate's,<sup>145</sup> appears to be more far-reaching along several important dimensions<sup>146</sup> (although this will ultimately depend upon judicial interpretation). The House took the fairly natural step of inserting into section 1512 a general proscription on the obstructor's *own* obstructive acts, new section 1512(c),<sup>147</sup> leaving the rest of section 1512's structure intact.

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142. The obstruction provisions in Sarbanes-Oxley that originated in the House were finally passed as H.R. 5118 on July 16, 2002. H.R. 5118, 107th Cong. (2002). The history leading up to passage is somewhat convoluted. The House's first effort toward enacting what became Sarbanes-Oxley was passage of *another* bill, H.R. 3763 (4/24/02). H.R. 3763, 107th Cong. (2002). This was followed in the Senate by passage of S. 2673 (7/15/02), and the two were taken to conference. S. 2673, 107th Cong. (2002). H.R. 5118 appears to have been the House's "afterthought" in the wake of additional events following passage of H.R. 3763, including the revelation in early July that Global Crossing was being investigated for shredding documents relevant to its bankruptcy proceedings. *See* 148 CONG. REC. H5475, (daily ed. July 25, 2002) (statement of Rep. Bereuter) (mentioning Global Crossing as a "recent corporate scandal"); Dennis K. Berman, *U.S. to Investigate Possible Shredding at Global Crossing*, WALL ST. J., July 3, 2002, at B4 (announcing the Global Crossing investigation). H.R. 5118 was then incorporated into the conference report on H.R. 3763. H.R. CONF. REP. NO. 107-610 (2002).

Ironically, the House's approach in H.R. 5118 was similar to the Senate's approach, ultimately rejected, in the original passage of section 1512 in 1982. S. 2420, 97<sup>th</sup> Cong. (1982). *See also Poindexter*, 951 F.2d at 382-84 (discussing the legislative history behind section 1512's original passage).

143. *Compare* H.R. CONF. REP. NO. 107-610 (2002), *with* H.R. 3763, 107th Cong. (2002), *and* S. 2673, 107th Cong. (2002).

144. *United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999).

145. Senator Leahy, who sponsored the Senate approach, received both more press and more floor time to advocate his solution. *See, e.g.*, 148 CONG. REC. S1785 (daily ed. Mar. 12, 2002) (statement of Sen. Leahy); News Conference of Senator Leahy, *Introduction of the Corporate and Criminal Fraud Accountability Act*, transcript available at <http://www.senate.gov/~leahy/press/200203/031202.html>. In contrast, regarding the House's alternative approach, electronic searches uncover no entry in the congressional record, nor any press.

146. *But see* John J. Falvey Jr. & Matthew A. Wolfman, Commentary, *The Criminal Provisions of Sarbanes-Oxley: A Tale of Sound and Fury?*, 1 No. 19 ANDREWS ENRON LITIG. REP., Oct. 7, 2002, at 15 (arguing that the change to section 1512 "largely overlaps with the [Senate-sponsored additions of sections 1519 and 1520] and with existing law").

147. *See* 18 U.S.C.A. § 1512(c) (West Supp. 2003):

Whoever corruptly—(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) *otherwise obstructs*, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

The Senate, on the other hand, added two new provisions to Chapter 73. New section 1520 applies only to auditors.<sup>148</sup> New section 1519 appears to apply only to obstructive acts conducted with regard to tangible evidence.<sup>149</sup> Moreover, the “justice” protected by new section 1519 seems to include only activities by federal agencies and departments, and bankruptcy cases under Title 11—and not general judicial proceedings.<sup>150</sup> On the other hand, new section 1519 applies “in relation to or in contemplation of any matter” within the agency’s or department’s jurisdiction, and it is possible that courts will read this nexus requirement to be weaker than that applicable to section 1512(c).

How then does Sarbanes-Oxley change Chapter 73 in the context of civil suits between private parties? Possibly the only change for such cases is that the obstructer’s own generally obstructive acts would now be proscribed at some time prior to the filing of the complaint. Such self-help would now fall under section 1512(c) with its relaxed nexus requirement, rather than just under section 1503(a)’s

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(emphasis added). New section 1512(c)(2) appears to add *general* obstructive behavior by the obstructer herself to the list of activities regulated by section 1512. In terms of the obstructive activities covered, then, it appears to overlap with the omnibus provision, section 1503. Notice, however, that section 1512(c)(1) also specifically, and apparently redundantly, mentions the destruction and manipulation of tangible evidence.

148. See *id.* § 1520(a)(1):

Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.

Section 1520 essentially adds, within the somewhat unlikely context of Chapter 73, another item—namely, “audit or review workpapers”—to the long list of statutory record retention requirements spread throughout the U.S. Code. See *generally* CCH GUIDE TO RECORD RETENTION REQUIREMENTS (as of July 1, 2001) (cataloging the federal statutory and regulatory record retention requirements). The new section instructs the SEC more precisely to define what kind of documents must be retained, and the impact of this new section will depend in large part on what that definition turns out to be.

149. See 18 U.S.C.A. § 1519:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under Title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

150. See *id.* (applying the provision to “any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11”). The late addition of bankruptcy proceedings to this provision may have been partly inspired by the contemporaneous announcement that Global Crossing was being investigated for shredding documents relevant to bankruptcy proceedings. See *generally* Berman, *supra* note 142 (announcing the Global Crossing investigation).

omnibus provision, which requires that the obstructed justice be pending.<sup>151</sup>

Unfortunately, Congress did not take the opportunity to clarify just how much more relaxed section 1512(c)'s nexus requirement is meant to be. Although it is clear that the obstructed "official proceeding" need not be *pending* under section 1512(c), this leaves open many questions regarding how tightly targeted to a specific proceeding the tampering need be. New section 1512(c) would probably reach a defendant's destruction of documents relevant to a particular plaintiff's suit that is only anticipated and not actually pending. But what if the documents are destroyed to guard against whatever suit might arise, without having specific litigation in mind? For example, how would the provision apply to the ongoing destruction of safety test records by a manufacturer when there is no specific plaintiff—perhaps not even a specific buyer for the product? Arguably, such upstream behavior would still fall outside the bounds of new section 1512(c).<sup>152</sup> At the very least, Sarbanes-Oxley does little to resolve the issue.

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151. Recall that section 1519 with its arguably broader language of "matters," "cases," and "contemplation" appears to apply to judicial proceedings only when they arise under the bankruptcy laws in Title 11.

152. See, e.g., *United States v. Shively*, 927 F.2d 804, 812–13 (5th Cir. 1991) (interpreting, in the context of other provisions of section 1512, the "official proceeding" requirement also applicable to new section 1512(c) as meaning that "[w]ithout at least a circumstantial showing of intent to affect testimony at some *particular* federal proceeding that is ongoing or is scheduled to be commenced in the future, this statute does not proscribe his conduct" (emphasis added)). But see *United States v. Scaife*, 749 F.2d 338, 348 (6th Cir. 1984) (employing an apparently weaker nexus requirement in connection with the same "official proceeding" requirement).

This "official proceeding" requirement, which applies to new section 1512(c), does not apply to all provisions of section 1512. A comparison of the different nexus requirements applicable to other provisions of section 1512 may shed some light on what the nexus requirement for section 1512(c) is and is not. See, e.g., *United States v. Veal*, 153 F.3d 1233, 1249–50 (11th Cir. 1998):

Sections 1512(a)(1)(A), (a)(1)(B), and (b)(2)(A)–(D) [like new 1512(c)] all require that the proscribed conduct occur in the context of an "official proceeding". . . . In contrast, §§ 1512(a)(1)(C) and (b)(3), the subsection under which this case arises, contain a different jurisdictional basis: the defendant must have committed the obstructive conduct *with the intent to* "prevent," in § 1512(a)(1)(C), or "hinder, delay, or prevent," in § 1512(b)(3) communication to a federal law enforcement officer or judge information relating to the commission or possible commission of a federal crime.

The Eleventh Circuit's implicit comparison of this weaker nexus requirement (applying to, *inter alia*, new section 1512(c)) is illuminating. See *id.* at 1250:

[F]ederal jurisdiction under § 1512(b)(3) [with its weaker nexus requirement] is based on the federal interest of protecting the integrity of potential federal investigations by ensuring that transfers of information to federal law enforcement officers and judges relating to the possible commission of federal offenses be truthful and unimpeded. By



To bring home the significance of Congress's silence on this issue, consider how new section 1512(c), would bear upon two salient cases.

*c. Section 1512(c) and Andersen.* Although the shredding episode that provided the main impetus for Sarbanes-Oxley's obstruction provisions concerned an agency investigation, rather than a private suit (the focus here), it is instructive to consider how new section 1512(c) would have applied ignoring this distinction.<sup>153</sup> Arthur Andersen, the partnership, was convicted under former (and new) section 1512(b) of corruptly persuading employees to obstruct justice by shredding documents.<sup>154</sup> The "official proceeding" in question—which was not pending at the time of Andersen's obstructive acts, but was the specific object of Andersen's intent—was an SEC inquiry into Enron's special purpose entities.<sup>155</sup> Were these same events prosecuted under new section 1512(c), the secretaries and staff who actually did the shredding—as opposed to those who "persuaded" them to do so—would also be criminally liable and possibly subject to roughly a year in prison.<sup>156</sup>

Sarbanes-Oxley leaves unanswered the question whether Andersen would have been criminally liable under any portion of Chapter 73 if it had simply complied with its own policy of routinely destroying audit-related documents. A few years before, the SEC had made extensive use of Andersen's internal documents in proving that Andersen knew of Waste Management's improper accounting.<sup>157</sup> In response to this debacle,<sup>158</sup> Andersen devised a "document retention

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its wording, § 1512(b)(3) does not depend on the existence or imminency of a federal case or investigation but rather on the *possible* existence of a federal crime and a defendant's intention to thwart an inquiry into that crime.

153. Although they do not apply to a general civil suit between private parties, new section 1519 and section 1520 might have applied to the *Andersen* case. *See supra* notes 148–149; *infra* note 161.

154. *See supra* note 125 and accompanying text.

155. *See* Indictment at 5, *United States v. Arthur Andersen, LLP*, No. CRH-02-121 (S.D. Tex. filed Mar. 7, 2002).

156. *See supra* note 114. Compare this to the up to \$500,000 fine that would have been paid by the partnership had it survived. Violations of section 1512(b) are punishable with fines or imprisonment for not more than ten years, or both. 18 U.S.C. § 1512(b) (2000).

157. *See* Eichenwald, *supra* note 3.

158. *See id.* ("The problems created by the Waste Management records were never to be repeated.").

policy” that required preservation of audit work files, but quick destruction of audit-related documents.<sup>159</sup> However,

early [in 2000], to cut costs, Andersen dismissed some employees who handled the newly required shredding, and paper began stacking up. By June [2001], accountants handling Enron in Houston were virtually buried in documents that, under the policy, should have been shredded long before.<sup>160</sup>

If Andersen had been destroying audit-related documents as it went along, rather than after it learned of the SEC inquiry in October 2001, would it have been criminally liable under new section 1512(c)? Arguably not. Although section 1512(c) does not require that the obstructed official proceeding be pending, it does seem to require that a particular official proceeding be looming on the horizon.<sup>161</sup> If Congress had wanted to criminalize the kind of upstream destruction that might have taken place under Andersen’s retention policy, it could have done so with specific language. Indeed, the courts’ demonstrated tendency to interpret Chapter 73’s ambiguities in favor of the accused<sup>162</sup> would have indicated that specific statutory language was necessary to criminalize this kind of behavior.<sup>163</sup>

*d. Section 1512(c) and Aguilar.* *Aguilar*,<sup>164</sup> like *Andersen*, concerned an agency investigation rather than a private suit. But

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159. See generally ARTHUR ANDERSEN, PRACTICE ADMINISTRATION: CLIENT ENGAGEMENT INFORMATION—ORGANIZATION, RETENTION AND DESTRUCTION, STATEMENT NO. 760 (Feb. 2000), available at <http://www.ethicsandlawyering.com/issues/files/andersenretenpolicy.pdf> (on file with the *Duke Law Journal*).

160. See Eichenwald, *supra* note 3.

161. See *supra* note 152 and accompanying text.

What about sections 1519 and 1520? Even new section 1519, which employs the arguably broader “in contemplation of” language, seems to require a particular “matter” or “case.” If an individual shreds documents as she goes along so as to obstruct whatever matter or case may or may not arise, section 1519 may not apply. Certainly, § 1519 itself does little to make clear how specific one’s “contemplation” must be.

Because Andersen was acting as an auditor, new section 1520 might also apply, though at least one commentator has doubted its application to the facts of this case. See Falvey & Wolfman, *supra* note 146 (“In the case of Arthur Andersen, for example, there was no evidence that the firm shredded audit workpapers, but rather that it shredded other audit-related documents. This new provision imposes a statutory requirement for a retention practice that public accounting firms already observe.”).

162. See *supra* Part II.A.1.a (discussing *United States v. Aguilar*).

163. Cf. *United States v. Poindexter*, 951 F.2d 369, 378–84 (D.C. Cir. 1991) (employing similar logic in interpreting § 1505).

164. *United States v. Aguilar*, 515 U.S. 593 (1995).

because it also appears to have played a role in motivating the obstruction provisions of Sarbanes-Oxley,<sup>165</sup> it is worth considering how new section 1512(c) would apply to its facts. Recall that Judge Aguilar was acquitted in that case under section 1503(a)'s omnibus provision because of an insufficient nexus between his obstructive act and ongoing grand jury investigations.<sup>166</sup> There is at least a colorable argument that Judge Aguilar's lie to the FBI agent would not result in his conviction under new section 1512(c) either.<sup>167</sup>

Relative to section 1503, section 1512 relaxes the nexus requirement in two ways, neither of which seems to bridge the gap in *Aguilar*. First, as noted, unlike section 1503, section 1512 does not require that the "official proceeding" be "pending."<sup>168</sup> This relaxation is irrelevant to the *Aguilar* fact pattern, because the grand jury proceeding was pending anyway, and Judge Aguilar knew it to be so.<sup>169</sup> Second, section 1512 does not require specific intent that the official proceeding be federal.<sup>170</sup> This relaxation is probably also moot for *Aguilar*. Aguilar seems to have known about the particular *federal* grand jury convened against him.<sup>171</sup> Instead, according to the court's interpretation of the evidence in *Aguilar*, what Aguilar did not know firmly enough was whether the FBI agent to whom he lied *would be called to testify*.<sup>172</sup> It is not clear why this lack of knowledge would not still be decisive under new section 1512(c).<sup>173</sup>

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165. See *supra* note 141.

166. *Aguilar*, 515 U.S. at 600–01.

167. Note that on its face, new § 1519 would not apply because it is limited to obstructive acts performed on "records, documents or tangible objects."

168. See 18 U.S.C.A. § 1512(f)(1) (West Supp. 2003) ("[A]n official proceeding need not be pending . . .").

169. 515 U.S. at 600–01.

170. See § 1512(g) ("[N]o state of mind need be proved with respect to the circumstance—(1) that the official proceeding . . . is before a judge or court of the United States . . .").

171. See 515 U.S. at 600–01.

172. *Id.* at 601.

173. § 1512(c). In interpreting former section 1512, 18 U.S.C. § 1512 (2000), some commentators seem to assert that FBI investigations are themselves "official proceedings," and thus, in particular, "agency proceedings" "authorized by law." See Lisa R. Rafferty & Julie Teperow, *Obstruction of Justice*, 35 AM. CRIM. L. REV. 989, 1008–09 (1998):

[I]n order to secure a conviction under § 1512, an official proceeding need not be pending or about to be instituted at the time of the offense. Hence, an investigation by a federal agency may constitute an "official proceeding" within the meaning of § 1512(e). Furthermore, if an individual realizes that a federal proceeding might be commenced and acts in such a manner as to affect potential testimony, conviction under § 1512 is permissible.

2. *Contempt*. To be held in contempt under 18 U.S.C. § 401,<sup>174</sup> a party must either commit the offending act in the court's presence<sup>175</sup> or be in willful<sup>176</sup> violation of a standing court order. Thus, an individual may be in contempt for violating a subpoena issued during discovery under Federal Rule of Civil Procedure 45(e).<sup>177</sup> But out-of-court evidence tampering that does not violate a specific order is not criminal under section 401. Thus, even document destruction in direct response to a discovery request may not be criminal. In partial mitigation of this restriction, a party may attempt to obtain, immediately upon filing, a court order directing her opponent to retain all relevant documents, and practice guides and treatises often suggest doing so.<sup>178</sup> Such orders, however, will never predate filing of the complaint. Thus, contempt effectively requires a pending proceeding. Consequently, its reach is even more restricted to downstream tampering than is obstruction of justice.

In return for this stricter restriction to downstream activity—and in line with the sliding scale identified above—contempt sanctions are more summarily imposed. The presiding judge may herself initiate criminal contempt proceedings without involving the prosecutor. And

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Jeffrey R. Kallstrom & Suzanne E. Roe, *Obstruction of Justice*, 38 AM. CRIM. L. REV. 1081, 1111–12 (2001) (repeating Rafferty & Teperow's language essentially verbatim). This analysis seems to conflate the definition of an "official proceeding" with the requirement that it be "pending." Moreover, the analysis appears too divorced from the main issue of the defendant's state of mind regarding the connection between the obstruction and the justice, the issue which forms the core of the Supreme Court's analysis of section 1503, see *Aguilar*, 515 U.S. at 599, and is arguably the heart of the matter in section 1512 as well.

174. 18 U.S.C. § 401 (2000):

Power of court. A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—  
(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

175. *Id.* § 401(1). In some cases, the court's "constructive presence" has sufficed. *In re Indep. Pub. Co.*, 240 F. 849, 857 (9th Cir. 1917).

176. See De Marco, *supra* note 120, at 591–92. ("[C]ourts hearing contempt cases generally convict only those persons who purposefully intended to be contemptuous—those who intended to flout the authority of the court.").

177. See FED. R. CIV. P. 45(e) ("Failure by any person without adequate excuse to obey a subpoena . . . may be deemed a contempt of the court from which the subpoena issued.").

178. See, e.g., GORELICK ET AL., *supra* note 12, § 3.4, at 76 ("[P]rudent counsel should move for a document-preservation order at an early stage of the litigation.").

the judge whose court was the object of the alleged “contempt” will then be the one to handle the contempt proceeding.<sup>179</sup>

3. *Perjury*. There are three perjury statutes in Title 18’s Chapter 79. Section 1622 concerns inducing another to commit perjury.<sup>180</sup> Sections 1621<sup>181</sup> and 1623<sup>182</sup> reach the act of perjury itself.

Of the latter two concerning perjury per se, section 1623 applies farther downstream than section 1621. Section 1623 applies only to falsehoods perpetrated “in any proceeding before or ancillary to any court or grand jury of the United States.”<sup>183</sup> In practice, “ancillary” proceedings have included depositions conducted under rules of procedure.<sup>184</sup> In contrast, section 1621 applies whenever a person has “taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered.”<sup>185</sup> Courts have construed this language to encompass

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179. See FED. R. CRIM. P. 42(b) (allowing a judge to summarily punish criminal contempt committed in her presence); see also Oesterle, *supra* note 12, at 1204–07 (outlining the application of section 401 to document destruction cases); Solum & Marzen, *supra* note 38, at 1113–14 (listing differences between contempt and obstruction of justice).

180. 18 U.S.C. § 1622 (2000).

181. 18 U.S.C. § 1621 (2000). Section 1621, “Perjury generally”, reads as follows:

Whoever—(1) having *taken an oath* before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, *willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury.*

(emphases added).

182. 18 U.S.C. § 1623(a) (2000). Section 1623(a), “False declarations before grand jury or court”, reads as follows:

Whoever under *oath . . . in any proceeding before or ancillary to any court or grand jury* of the United States *knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration*, shall be fined under this title or imprisoned not more than five years, or both.

(emphases added).

183. *Id.*

184. Kislak & Donoghue, *supra* note 39, at 963 (describing section 1623 as “construed to limit the operation of the statute to testimony actually submitted in the presence of the court or grand jury or in the course of a deposition pursuant to valid rules of procedure”). Compare *United States v. Krogh*, 366 F. Supp. 1255, 1256 (D.D.C. 1973) (holding that a sworn deposition constituted an “ancillary proceeding”), with *Dunn v. United States*, 442 U.S. 100, 111 (1979) (holding that a sworn statement given in the course of an interview in an attorneys’ office was too informal to qualify as an “ancillary proceeding” under section 1623).

185. 18 U.S.C. § 1621.

investigations, agency proceedings, and signed affidavits,<sup>186</sup> all of which may be precursors to depositions, or grand jury testimony.

In line with the sliding scale identified above, section 1623, which applies only later along the process time line, is otherwise broader in application.<sup>187</sup> First, section 1623 requires only that the defendant knowingly make the false statement. Under section 1621 the falsity must be “willful.”<sup>188</sup> Second, section 1623 applies to “mak[ing] or us[ing] any other information, including any book, paper, document, record, recording, or other material.”<sup>189</sup> Section 1621, in contrast, applies only to a narrower range of activities constituting “stating or subscribing any material matter.” Third, under section 1623, falsity may be proven simply by establishing that the defendant made “irreconcilably contradictory declarations.”<sup>190</sup> Section 1621, on the other hand, requires the government to prove precisely which of the contradictory statements was false.<sup>191</sup> Last, while section 1621 has been interpreted to incorporate the common law “two witness rule,”<sup>192</sup> section 1623 specifically eschews this formula,<sup>193</sup> allowing

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186. Kislak & Donoghue, *supra* note 39, at 962 (describing section 1621 as “construed to extend the operation of section 1621 to a diverse range of situations, not all related to judicial proceedings”); *see, e.g.*, *Woolley v. United States*, 97 F.2d 258, 261 (9th Cir. 1938) (holding that perjury can be committed in an ex parte investigation); *Natvig v. United States*, 236 F.2d 694, 695 (D.C. Cir. 1956) (affirming defendant’s conviction for perjury in a hearing before the Federal Communications Commission); *United States v. Holland*, 22 F.3d 1040, 1042 (11th Cir. 1994) (affirming defendant’s conviction for perjury in a signed affidavit).

Section 1621 also applies to congressional hearings. Kislak & Donoghue, *supra* note 39, at 959 n.9; *see, e.g.*, *United States v. Dean*, 55 F.3d 640, 660–61 (D.C. Cir. 1995) (upholding a conviction under section 1621 where the defendant had perjured herself in a Senate hearing).

187. *See* Kislak & Donoghue, *supra* note 39, at 973 (“While § 1621 is broader than § 1623 with regard to the range of proceedings where it applies, the opposite is true regarding the range of conduct condemned.”).

188. *See also* Kislak & Donoghue, *supra* note 39, at 964 (“Section 1623, unlike § 1621, does not require proof that the alleged false testimony was submitted willfully. Rather, it requires that such testimony have been knowingly stated or subscribed.”).

189. 18 U.S.C. § 1623(a) (2000); *see also* Kislak & Donoghue, *supra* note 39, at 973–74 (“Although it is infrequently invoked, the ‘make or use’ provision of § 1623 has been broadly construed.”).

190. 18 U.S.C. § 1623(c).

191. *See, e.g.*, *United States v. Lebon*, 4 F.3d 1, 2 (1st Cir. 1993) (“[T]he fact that a witness contradicts herself . . . does not establish perjury.”). For further discussion of this point, *see* Kislak & Donoghue, *supra* note 39, at 967 and sources cited therein.

192. This is the rule that one witness alone, with no other evidence of any form, is insufficient to prove perjury. *See* Kislak & Donoghue, *supra* note 39, at 972–73 and sources cited therein.

193. *See* 18 U.S.C. § 1623(e).

proof beyond a reasonable doubt by any constellation of admissible evidence.<sup>194</sup>

*B. Procedural and Evidentiary Sanctions*

The court that hears the underlying case may impose sanctions for evidence tampering under either the Federal Rules of Civil Procedure or its “inherent power” to regulate process. The overall pattern for such sanctions is similar to that for the criminal statutes examined above. For the most part, procedural and evidentiary sanctions reach only evidence tampering perpetrated after the complaint has been filed. Moreover, even along the limited reaches where such sanctions apply, the farther downstream the tampering, the greater the sanction and the more summarily it is imposed.

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194. Before leaving the topic of criminal sanctions it is worth considering the relationship between perjury and obstruction. Consider first the definitions of the crimes. It seems clear that both section 1621 and section 1623 perjury will usually also qualify as obstruction of justice under new section 1512(c)(2), especially in the context of civil suits between private parties. First, the perjurious acts of making or subscribing a false statement or making or using false records would most likely fall under the range of obstructive conduct proscribed by section 1512(c)(2). See *supra* note 147. Second, the mens rea requirements for either brand of perjury would probably imply the mens rea requirements for obstruction in nearly every case. Compare 18 U.S.C. § 1621, and 18 U.S.C. § 1623(a), with 18 U.S.C.A. § 1512(c)(2) (West Supp. 2003) (requiring that the defendant have acted “willfully,” “knowingly,” and “corruptly” respectively). Third, it seems that a “proceeding before or ancillary to any court or grand jury of the United States,” and probably even any “competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered” would qualify as an “official proceeding” under section 1512. Cf. POSNER, *supra* note 54, at 37 (stating, prior to the passage of new section 1512(c) that “‘obstruction of justice’ . . . includes perjury when committed in either a civil or criminal proceeding; [but] excludes perjury in other settings, for example before a congressional committee unless the committee is inquiring into possible violations of law”). After passage of new section 1512(c), “obstruction of justice” presumably includes perjury, as a general obstructive act under section 1512(c)(2), when committed before an “official proceeding,” defined in section 1515(a)(1) to include not only civil or criminal proceedings, but also federal agency proceedings authorized by law and congressional proceedings. See *supra* note 138 for the text of section 1515(a)(1) and *supra* note 147 for the text of section 1512(c). That said, there may still be situations where an oath is administered before a “competent tribunal, officer, or person, in [a] case in which a law of the United States authorizes an oath to be administered,” as per section 1621, and yet there is no “official proceeding” under sections 1512(c) and 1515(a)(1). Recall that new section 1519, which appears to apply to a broader range of “justice” than does section 1512(c), does not, on its face at least, pertain to lying under oath.

For a comparison of sentencing under the two provisions, see *supra* note 114.

1. *Sanctions under the Federal Rules of Civil Procedure.*<sup>195</sup>

*a. Failure to Obey a Court Order.* Federal Rule of Civil Procedure 37(b) authorizes sanctions if a party fails to obey a court order “to provide or permit discovery.”<sup>196</sup> In addition to the orders specifically listed in Rule 37,<sup>197</sup> a wide range of orders are subject to sanction. For example, it is now common practice for parties to obtain “evidence preservation orders,”<sup>198</sup> the violation of which has been held sanctionable under Rule 37(b).<sup>199</sup>

The often cited case of *Wm. T. Thompson Co. v. General Nutrition Corp.*<sup>200</sup> illustrates well how evidence tampering might trigger Rule 37(b) sanctions. Thompson, a national brand vitamin manufacturer, sued GNC, a vitamin retailer, for advertising Thompson’s products at a 20 percent discount, but purposefully not having enough in stock to meet expected demand, thus employing “bait and switch” advertising for its own private label.<sup>201</sup> GNC’s

195. Although several federal rules touch on evidence tampering, only the most important are reviewed here. Relevant federal rules (of both procedure and evidence) not explicitly considered in Section II.B, generally, include Federal Rule of Civil Procedure 56(g) (sanctioning the bad faith presentation of affidavits in supporting or defending against a motion for summary judgment), Federal Rule of Evidence 804(b)(6) (exempting from the hearsay rule statements “offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness”), and Federal Rule of Evidence 1004(1) and (3) (allowing “other evidence” of contents of a writing, recording, or photograph when “originals” are lost or destroyed, unless these are lost or destroyed by a proponent in bad faith or the party in control of the originals fails to produce them).

196. FED. R. CIV. P. 37(b)(2).

197. The list includes court orders to compel discovery, under Federal Rule of Civil Procedure 37(a), in light of a party’s failure adequately to (1) make the various “required disclosures” under Federal Rule of Civil Procedure 26(a) regarding how she plans to support her case, FED. R. CIV. P. 37(a)(2)(A)), (2) answer questions put to her in a deposition or an interrogatory, or (3) permit inspection of documents and things upon proper request, FED. R. CIV. P. 37(a)(2)(B). Also specifically enumerated in Rule 37(a) are orders to submit to physical and mental examinations, FED. R. CIV. P. 37(b)(2), 35(a), and orders to attend the parties’ scheduling conference for discovery, FED. R. CIV. P. 26(f), 37(b)(2).

198. See Oesterle, *supra* note 12, at 1225 (“Litigants have begun to avoid a part of the problem by securing court orders early in the litigation that all documents material to the litigation must be preserved for possible production at the request of opponents.”).

199. See *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984) (imposing sanctions on GNC for failure to comply with an order from a special master); *In re Air Crash Disaster Near Chi., Ill.* on May 25, 1979, 90 F.R.D. 613, 618 (N.D. Ill. 1981) (“A party may not destroy documents where a preservation order has been entered . . .”); see also GORELICK ET AL., *supra* note 12, § 3.4, at 76 (describing, with examples from case law, how the violation of an order to preserve evidence can trigger sanctions under Rule 37).

200. 593 F. Supp. 1443.

201. *Id.* at 1444.



purchase, sale, and inventory records—in both hard copy and electronic form—were important evidence in the case. One year after Thompson filed its complaint, at a time when GNC still had these records in its possession,<sup>202</sup> the court ordered GNC to preserve such records.<sup>203</sup> GNC declined to pass this directive on to its internal departments and employees, and the records were destroyed.<sup>204</sup> After GNC failed to produce the records in response to Thompson's subsequent discovery request, the court ordered GNC to do so. At the same time, the court widened the scope of its original preservation order.<sup>205</sup> No records were forthcoming. Ultimately GNC was sanctioned under Rule 37(b) for violating the court's multiple orders to preserve and produce evidence.<sup>206</sup>

In addition to illustrating how Rule 37(b) sanctions are triggered, the *GNC* case also illustrates the fact that the sanctions within the court's discretion are broad-ranging.<sup>207</sup> In the *GNC* case, the court struck GNC's answer, entered default judgment against it on Thompson's claims, dismissed GNC's own claims against Thompson,<sup>208</sup> and required GNC to pay (with interest) the attorneys'

202. *Id.* at 1445 (finding of fact 7).

203. *Id.* (finding of fact 18).

204. *Id.* at 1447–48 (findings of fact 19–28).

205. *Id.* at 1449–50 (finding of fact 35).

206. *Id.* at 1455.

207. Federal Rule of Civil Procedure 37(b)(2)(A)–(E) enumerates a number of sanctions. To the detriment of the violator and with varying relationship to the nature of the violation, the court may take certain facts as given, refuse to hear certain claims or defenses, refuse to admit certain evidence, strike certain pleadings, stay or dismiss part or all of the action, render judgment by default, hold the violator in contempt of court, or any logically consistent combination of the above. Additionally, under Rule 37(b)(2), the court may force payment of certain costs and attorneys' fees.

The court has wide discretion to choose which of these enumerated sanctions to impose. FED. R. CIV. P. 37(b)(2) (authorizing the court to make any “such orders in regard to the failure as are just”); Oesterle, *supra* note 12, at 1226 (“Once a court is willing to invoke the sanctions of rule 37(b), it has wide discretion in its choice of orders.”). But courts are reluctant to go beyond this list. CHARLES ALAN WRIGHT ET AL., 8A FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2289 (2d ed. 1994):

[T]he five lettered paragraphs of Rule 37(b)(2), setting out some eight possible sanctions, are not mutually exclusive. The court may impose several of these specified sanctions at the same time. . . .

. . . .

The court is not limited to the kinds of orders specified in Rule 37(b)(2), though courts have been reluctant to impose novel sanctions of a sort not mentioned in the rule.

(footnotes omitted).

208. *Gen. Nutrition Corp.*, 593 F. Supp. at 1456.

fees that Thompson had incurred in attempting to compel discovery of the records, conducting discovery on the destruction thereof, and pursuing sanctions under Rule 37(b).<sup>209</sup>

Compared to exercise of the court's inherent powers, as discussed below in Section B.2, Rule 37(b) sanctions are—by their nature—summarily imposed. The court need only satisfy itself that the litigant violated a valid and unambiguous court order.<sup>210</sup> The litigant's intent, for example, is generally not at issue.<sup>211</sup>

Nevertheless, the prerequisites for imposing Rule 37(b) sanctions guarantee that such sanctions will be imposed only for tampering that occurs late in the game. Though “court order” is broadly defined under the rule, imposition of Rule 37(b) sanctions generally requires the existence of a court order of some kind.<sup>212</sup> Moreover, courts

209. *Id.* at 1456–57.

210. *See, e.g., id.* at 1455–56 (imposing discovery sanctions for bare violation of an order). The existence of a valid order is not just sufficient but in fact necessary. *See* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 48(A), at 582–83 (3d ed. 2000) (discussing the requirement of a court order for the imposition of sanctions); *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) (holding that a violation can occur only where there is an identifiable discovery order); *Holcomb v. Allis-Chalmers Corp.*, 774 F.2d 398, 400–01 (10th Cir. 1985) (“[I]f the order of court which the plaintiffs and their attorneys disobeyed was not itself a valid order, then the sanctions must necessarily fall.”).

211. *See Gen. Nutrition Corp.*, 593 F. Supp. at 1455–56 (not requiring a finding of bad intent); *cf. id.* at 1454 (examining, in determining whether to exercise the court's inherent powers, whether GNC acted in bad faith).

212. *See* WRIGHT ET AL., *supra* note 207, § 2289 (“Rule 37(b) usually has no application if there has not been a court order.”). However, the order may be oral, JOSEPH, *supra* note 210, § 48(A), at 582; WRIGHT ET AL., *supra* note 207, § 2289, and in some cases even “constructive,” GORELICK ET AL., *supra* note 12, § 3.4, at 76; JOSEPH, *supra* note 210, § 48(A), at 583.

Note that some courts have held a party in violation of an order for its failure to produce documents that it previously destroyed. *See* *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (“Even though a party may have destroyed evidence prior to issuance of the discovery order and thus be unable to obey, sanctions are still appropriate under Rule 37(b) because this inability was self-inflicted.”); *In re Air Crash Disaster Near Chi., Ill.* on May 25, 1979, 90 F.R.D. 613, 620–21 (N.D. Ill. 1981) (holding that American Airlines' failure to produce a report due to its undisclosed destruction of that report was a “failure to respond” within the context of Rules 34(b) and 37(b)).

Note, also, that under *other* provisions of Rule 37, a standing court order is not a prerequisite for behavior to be sanctionable. These provisions are less applicable to evidence tampering. *See* FED. R. CIV. P. 37(c)(1) (authorizing sanctions when a party improperly and harmfully fails to make, update, or correct required disclosures under Rule 26); FED. R. CIV. P. 37(c)(2) (requiring that a party that fails to admit the genuineness of a document or the truth of a matter, as requested under Rule 36 must pay the other side's expenses in proving such, if the document turns out to be genuine or the matter true); FED. R. CIV. P. 37(d) (allowing sanctions for ignoring a discovery request outright); *see also* WRIGHT ET AL., *supra* note 207, § 2291 (interpreting Rule 37(d) as not applicable to partial failures of cooperation). *But see* GORELICK

generally issue such orders only upon motion by the other side.<sup>213</sup> Thus, a defendant will almost always enjoy some window of opportunity between notice of the plaintiff's claims, via service of the summons and complaint, and the issuance of an order to permit discovery of or to produce or preserve certain evidence.<sup>214</sup>

In the *GNC* case, for example, a year passed between when Thompson filed its complaint and when the court issued its first order directing GNC to preserve the business records.<sup>215</sup> Recall that at the time the order was issued, GNC had not yet destroyed the records. If GNC had destroyed the records in the window between the filing of the complaint and the issuance of the preservation order, sanctions under Rule 37(b) would not have been appropriate. (The court might have imposed sanctions under its inherent powers, as discussed below). And even if Thompson had made its request for production and its motion for an order to preserve at the same time as it filed its complaint, presumably there would still have been an interval between GNC's official notice of Thompson's claims and procurement of the preservation order.

In effect discovery sanctions, with their relatively wide range and toothy character, are imposed upon the tamperer only if her opponent has made it quite clear that the evidence at issue is important to his case. The tamperer who risks these sanctions is not merely on notice of her opponent's claims or defenses. Nor is she merely in possession of a discovery request indicating that her opponent hopes to use this evidence to prove his case. Rather, the tamperer sees that this evidence is so important to her opponent's case that the opponent is willing to go out of his way to motion the

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ET AL., *supra* 12, § 3.6, at 84–85 (attempting to establish a link between sanctions under Rule 37(d) and document destruction perpetrated prior to an order to preserve or produce).

213. See JOSEPH, *supra* note 210, § 48(A)(1), at 585 (“Except in the case of failure to disclose . . . the opposing party is required first to move for an order compelling discovery under Rule 37(a).”); *R. W. Int’l Corp. v. Welch Foods, Inc.*, 937 F.2d 11, 15 (1st Cir. 1991) (finding a failure to follow the “protocol” of Rule 37 where the opposing party, “[i]nstead of . . . adjourning the deposition and seeking an order to compel [discovery] . . . elected to bypass Rule 37(a) and seek immediate dismissal of the suit” and holding that “[u]nder such circumstances, the district court’s premature resort to Rule 37(b)(2) [could not] be upheld”).

214. See Oesterle, *supra* note 12, at 1222:

Incredibly, [Rule 37(b)] provides no explicit sanctions against parties who unjustifiably frustrate anticipated, or even served, discovery requests for documents by using the office paper shredder. Only when a party destroys documents in the face of a court order to preserve or produce documents does the rule seem to levy sanctions.

215. See *Gen. Nutrition Corp.*, 593 F. Supp. at 1445.

court for an order of preservation or an order to produce. This characteristic of discovery sanctions will become important in Part IV.

*b. Certification.* Federal Rules of Civil Procedure 11 and 26(g) can also be sources of sanctions for evidentiary foul play.<sup>216</sup> For example, Rule 11 may apply if a plaintiff lies about facts in her complaint,<sup>217</sup> a defendant denies in his answer a factual assertion by the plaintiff that he knows to be true,<sup>218</sup> or either party submits a false affidavit to accompany a motion or pleading.<sup>219</sup>

In the recent case of *Margo v. Weiss*,<sup>220</sup> for example, ex-members of the 1960s musical group the “Tokens” sued for a declaratory judgment that they were co-owners of copyright in the song, “The Lion Sleeps Tonight.”<sup>221</sup> Years before, the Tokens had relinquished copyright in the song, whose melody was based on an African lullaby, after learning that the “Weavers” had earlier recorded a song, “Wimoweh,” based on the same tune.<sup>222</sup> Decades later, the Tokens found out that the lyricists on their later version had cut a separate deal with the “Wimoweh” copyright holder to retain songwriter royalties.<sup>223</sup> In response, the Tokens filed suit to restore their own co-ownership.<sup>224</sup> Unfortunately, as each Token independently confirmed in his deposition, the Tokens had learned of the lyricists’ side deal more than three years before filing their suit, meaning that their suit was time-barred.<sup>225</sup> After defense counsel informed them of this fact, the Tokens filed affidavits (with an amended complaint) that

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216. See GORELICK ET AL., *supra* note 12, § 3.6, at 84–85. Note, however, that although the original version of this chapter was written in 1989 and there have been significant changes to Rule 11 since then, the 2004 cumulative supplement of this treatise does not update assertions made about this rule. See JAMIE S. GORELICK ET AL., *DESTRUCTION OF EVIDENCE*, § 3.6, at 103–04 (Supp. 2004). Yet another source of sanctions is 28 U.S.C. § 1927 (2000), the history of which parallels that of Rule 11. See JOSEPH, *supra* note 210, § 2(C), at 40–42.

217. See FED. R. CIV. P. 11(b)(3) (stating that submission to the court is a certification that the submitted allegations have or are likely to have evidentiary support).

218. See FED. R. CIV. P. 11(b)(4) (stating that submission of denials to the court are certifications that the denials are warranted on the evidence).

219. See *Bus. Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 544–45 (1991) (treating affidavits as “other papers” under Rule 11).

220. 213 F.3d 55 (2d Cir. 2000).

221. *Id.* at 57.

222. *Id.* at 57–58.

223. *Id.* at 58.

224. *Id.*

225. *Id.*

“updated,” as it were, their deposition testimony—the group now claiming in ensemble to have first been informed of the lyricists’ side deal several years later than originally stated, and within the statutory period.<sup>226</sup> The district court granted the defendant’s summary judgment motion and applied Rule 11 to force both the Tokens and their lawyers to pay \$22,000 of the defendant’s attorneys’ fees.<sup>227</sup>

Notwithstanding this conspicuous example, it is difficult to ascertain how frequently the current version of Rule 11 is applied in practice for any purpose, let alone for the purpose of punishing fabrication. Strengthening amendments to the Rule in 1983 purportedly set off an explosion of “satellite litigation.”<sup>228</sup> In response, Rule 11 was in some respects toned down in 1993.<sup>229</sup> Systematic empirical work on the Rule seems to have followed a similar cycle, with much activity between 1983 and 1993<sup>230</sup> and little thereafter. Less rigorous sources of evidence, however, do seem to indicate a reduced role for the amended Rule. On the basis of Rule 11’s new text, Justice Scalia argued that it had been rendered “toothless.”<sup>231</sup> Personal observation of practice under the amended Rule led Federal District Judge Milton Shadur to proclaim that “Rule 11 is pretty much

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226. *Id.* at 58–59.

227. *Id.* at 59.

228. Compare Lawrence C. Marshall, et al., *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 950–52 (1992) (finding significant Rule 11 activity in a survey study of selected districts in the Fifth, Seventh, and Ninth Circuits) with BURBANK, *supra* note 58, at 60–62 (finding that, for the Third Circuit, Rule 11 motions were made in only .5 percent of all pending civil cases during the period July 1, 1987 to June 30, 1988, and that 71 percent of attorneys had sought Rule 11 sanctions no more than once since the 1983 amendments to that rule), and Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1957 (1989) (“[M]y personal speculation is that such a study in the Seventh Circuit might conform the worst fears of Rule 11’s critics.” (emphasis added)).

Regarding reported cases, see Bruce H. Kobayashi & Jeffrey S. Parker, *No Armistice at 11: A Commentary on the Supreme Court’s 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure*, 3 SUPREME CT. ECON. REV. 93, 107 (1993):

[T]he volume of increase has been staggering: in the first 38 years of practice under the original rule, there were about 20 reported decisions addressing the rule; while in the first nine years of practice under the 1983 Amendment, there were some 6,000 reported decisions under the rule, including 600 decisions by courts of appeals and four decisions by the Supreme Court.

229. See generally Cynthia A. Leiferman, *The 1993 Rule 11 Amendments: The Transformation of the Venomous Viper into The Toothless Tiger?*, 29 TORT & INS. L.J. 497 (1994) (reviewing the 1993 textual changes to Rule 11).

230. See, e.g., BURBANK, *supra* note 58, at 60–62; Marshall et al., *supra* note 228, at 950–52.

231. Communication from the Chief Justice of the United States Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. 2072, reprinted in 146 F.R.D. 507, 507 (1993) (Scalia, J., dissenting, joined in relevant part by Thomas, J.).

dead.”<sup>232</sup> Others have made similar pronouncements on the same basis.<sup>233</sup> And the volume of reported activity under Rule 11, however imperfect an indicator of actual litigation behavior,<sup>234</sup> appears to have declined markedly.<sup>235</sup>

There is also some discussion in the treatises and cases of the possibility of using Rules 11 and 26(g) to sanction the destruction or suppression of evidence that occurs before issuance of a court order—thus picking up where Rule 37(b) leaves off.<sup>236</sup> Nonetheless, there is scant evidence that either rule has ever actually been applied in this manner.<sup>237</sup> Possibly, the reason is redundancy. Courts tend to deal

232. Laura Duncan, *Sanctions Litigation Declining*, 81 A.B.A. 12, 12 (1995) (quoting Judge Milton Shadur of the Northern District of Illinois). Note that Judge Shadur sits in the Seventh Circuit which, in contrast to the Third Circuit, was the site of significant Rule 11 activity prior to the 1993 amendments. See *supra* note 228.

233. *Id.* (reporting the similarly morbid impressions of other judges and practitioners—again, mostly from the Seventh Circuit); Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 626, 643 (1998).

234. See, e.g., BURBANK, *supra* note 58, at xiii, 4, 55, 59.

235. Duncan, *supra* note 232, at 12 (reporting results of law firm’s study of Rule 11 motions reported on Westlaw: “In November 1994, almost one year after the new amendments, there were 34 percent fewer motions filed than the same month a year earlier.”).

236. The possible hook for sanctions under these rules is that an attorney has failed to conduct “reasonable inquiry” in responding to a discovery request as required under, for example, Rule 26(g) if she or her client have in fact destroyed or suppressed the documents that were supposed to be turned over for inspection. See Nat’l Ass’n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 558 n.4 (N.D. Cal. 1987); see also GORELICK ET AL., *supra* note 12, § 3.7, at 85 (discussing the holding of *Turnage*). Further, if the party then fails to account for the content of these destroyed or suppressed documents in filing other nondiscovery papers with the court, then these too are submitted without reasonable inquiry, thus invoking Rule 11. See *Turnage*, 115 F.R.D. at 558 n.4; see also *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 n.2 (S.D.N.Y. 1991) (citing *Turnage* for this proposition); GORELICK ET AL., *supra* note 12, § 3.7, at 85 (discussing the holding of *Turnage*). Note, however, that the 2004 cumulative supplement to Gorelick’s treatise does not update this discussion to account for the 1993 amendments to Rule 11. See GORELICK ET AL., *supra* note 216, § 3.7, at 104.

237. Regarding Rule 11, there appears to be no case allowing use of the Rule to sanction the destruction or suppression of evidence that occurs before issuance of a court order. Rule 11 by its own terms does not apply to discovery-related papers. FED. R. CIV. P. 11(d). And at least one court seems to have interpreted this limitation in a manner inconsistent with Gorelick, Marzen, & Solum’s expansive reading of the Rule. See *supra* note 12; *Bakker v. Grutman*, 942 F.2d 236, 241 (4th Cir. 1991) (interpreting Rule 11 to preclude “preemption of Rules 26 and 37 for the sanction of discovery responses and abuses”).

Rule 26(g) is rarely employed at all. See WRIGHT ET AL., *supra* note 207, § 2052:

At the time the 1983 amendments were adopted it was supposed that Rule 26(g) was at least as important, and would be at least as much used, as Rule 11. That has not been the case. Rule 11 has been invoked many times, while Rule 26(g) has not been much used.

with pre-order evidence destruction by stepping outside the four corners of the Rules and exercising their so-called “inherent powers.”<sup>238</sup>

2. *The Court’s Inherent Powers.* Although courts have ventured farthest upstream by exercise of their “inherent powers,” the same two regularities apply to this source of sanctioning authority. First, as a general rule, courts have been reluctant to use such powers to punish foul play that is perpetrated farther upstream than the filing of the plaintiff’s complaint.<sup>239</sup> Second, to the limited extent that these inherent powers reach farther upstream than Rule 37(b), additional requirements are placed on the imposition of sanctions,<sup>240</sup> and the sanctions themselves are generally less severe.<sup>241</sup>

a. *“On Notice” Requirement Generally.* When sanctioning a litigant under the Rules for disobeying a court order, the analysis is relatively cut and dried.<sup>242</sup> When considering whether sanctions for evidence destruction are appropriate in the absence of a court order, courts conduct a murkier and more drawn-out analysis. Courts generally ask whether the litigant acquired a “duty” to preserve the

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JOSEPH, *supra* note 210, § 41(A), at 533 (“There is a relative scarcity of case law under . . . Rule 26(g) . . . [F]orce of habit exerts a strong pull. Lawyers and judges still think largely in terms of Rule 37 to resolve discovery disputes.”).

238. See, e.g., *Turner*, 142 F.R.D. at 72 (“Courts thus have the power to sanction the destruction of evidence, whether that authority is derived from Rule 37 or from their inherent powers.”); see also GORELICK ET AL., *supra* note 12, § 3.5, at 77:

For destruction of evidence beyond the reach of Federal Rule 37 . . . courts have found it necessary to invoke authority existing outside the rules of procedure. They have found it in a doctrine known as inherent power. Inherent power has been expressly invoked by numerous courts to justify imposition of sanctions for evidence destruction.

Oesterle, *supra* note 12, at 1231 (“[T]he federal trial courts have used their ‘inherent power’ to levy sanctions on parties to define a legal obligation to preserve evidence not otherwise specified in the Federal Rules of Civil Procedure.”). Professor Oesterle is specifically opposed to the resort to inherent powers. Instead, he proposes an amendment to the Federal Rules of Civil Procedure. See Oesterle, *supra* note 12, at 1231, 1239–41.

239. See GORELICK ET AL., *supra* note 12, § 3.12, at 103 (“[M]ost courts have imposed sanctions for destruction of evidence only after suit has formally begun.”); GORELICK ET AL., *supra* note 216, § 3.12, at 126 (“The belief that sanctions are not available for destruction of evidence before suit is filed may stem, in part, from the limited reach of Rule 37.”).

240. GORELICK ET AL., *supra* note 12, at 98–99 (analyzing both inherent powers and Rule 37(b) sanctions together and making a similar point in terms of whether notice was “actual” (i.e., essentially, whether an order was violated)).

241. See discussion of *Lewy v. Remington*, *infra* Part II.B.2.c.

242. See *supra* Part II.B.1.a.

evidence.<sup>243</sup> In large part, this is a question of whether the destroyer was “on notice” that the destroyed evidence would be relevant.<sup>244</sup> In general, a party is not “on notice” until suit is filed.<sup>245</sup> And in the few cases where parties were held to be “on notice” prior to filing, the destroyer’s expectations were usually tightly focused around a particular lawsuit against a particular opponent.<sup>246</sup>

*Cappellupo v. FMC Corp.*,<sup>247</sup> often cited for its imposition of sanctions for pre-filing destruction,<sup>248</sup> illustrates these points. In that gender-based employment discrimination case, the court did in fact invoke its inherent power to sanction<sup>249</sup> defendant/employer’s pre-complaint destruction of documents regarding employment practices and records of past complaints of discrimination.<sup>250</sup> What is less often noted, however, is that FMC began destroying the documents only one month before service of the complaint<sup>251</sup> and continued

243. See, e.g., *Turner*, 142 F.R.D. at 72; *Wm. T. Thompson Co. v. Gen. Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984); see also KOESEL ET AL., *supra* note 40, at 1–15 (emphasizing the “duty” formulation more than other treatises).

244. See *Gen. Nutrition Corp.*, 593 F. Supp. at 1455:

Sanctions may be imposed against a litigant who is on notice that documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information. While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.

Although this language is frequently quoted in discussions of inherent power, see, e.g., *Turner*, 142 F.R.D. at 72; GORELICK ET AL., *supra* note 12, § 3.11, at 93, it is worth noting that the findings of fact from the *General Nutrition Corp.* case itself seem to indicate that all or virtually all destruction followed a court order, and thus that invocation of the court’s inherent power was apparently superfluous in that case.

245. See GORELICK ET AL., *supra* note 12, § 3.12, at 104 (“Courts have imposed sanctions for precomplaint destruction of evidence in [only] a half dozen cases.”).

246. See *infra* notes 247–254 and accompanying text; cf. KOESEL ET AL., *supra* note 40, at 20. (“[C]ompanies do not have a general duty to retain all documents on the theory that a lawsuit might possibly be filed at some unspecified future time.”).

247. 126 F.R.D. 545 (D. Minn. 1989).

248. See, e.g., *Turner*, 142 F.R.D. at 72 (citing *Cappellupo* for this reason); *Patton v. Newmar Corp.*, 520 N.W.2d 4, 8 (Minn. Ct. App. 1994) (same); *Nesson*, *supra* note 12, at 797 n.21 (same); Lino Lipinsky et al., *Duty to Preserve Electronic Evidence After Enron and Andersen*, COLO. LAW., June 2003, at 58 n.8 (same).

249. The sanction amounted to twice the plaintiffs’ “expenditures resulting from defendant’s document destruction.” *Capellupo*, 126 F.R.D. at 553.

250. *Id.* at 547.

251. *Id.* at 548, 550 (finding that destruction began in early October 1983, while the complaint was received in early November of the same year).



destroying documents for quite some time after the complaint was filed.<sup>252</sup> Moreover, the destruction began only after one of the plaintiff/employees approached the defendant's equal employment opportunity manager and told her that "she was 'fed-up' with [its] . . . gender-based treatment and she was contemplating bringing a class action gender discrimination charge against the company, based upon her experiences and observations."<sup>253</sup>

How important is it that the defendant in *Cappellupo* knew of these specific plaintiffs' intentions to sue? The defendant had previously had similar legal troubles at another business location.<sup>254</sup> And one is thus led to speculate whether the court would have imposed sanctions if the defendant had destroyed the same documents merely in anticipation of the possibility that some as yet unspecified employee would file a gender discrimination suit also at plaintiffs' location.

As with obstruction of justice, the authority for imposing inherent powers sanctions when there is no specific plaintiff is unclear. In formulating the requirement of notice, courts often talk about *the* anticipated litigation.<sup>255</sup> With few exceptions, it appears that this encompasses *the* specific plaintiff. Thus, even if the defendant can imagine the nature of the claim, so long as she cannot anticipate the particular plaintiff who will bring it, she generally is not "on notice." And she may destroy documents relevant to this, as yet, faceless claim without invoking sanctions. A designer of a defective product, for example, is likely free to destroy negative safety test results before the first unit is sold, probably also before the first plaintiff is injured,

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252. *Id.* at 549 ("Document destruction continued from early October, [sic] 1983, through all of 1984, and beyond.").

253. *Id.* at 546. Thereafter, the defendant "made the decision to systematically destroy . . . documents relating to . . . employment practices and the employee relations department's personally-held records relating to equal employment opportunity and employee complaints of discrimination." *Id.* at 547.

254. *Id.*

255. *See, e.g., id.* at 551 ("Defendant's senior officials and senior employees were on notice of this potential lawsuit and were acutely aware of its subject."); *Fire Ins. Exch. v. Zenith Radio Corp.*, 747 P.2d 911, 914 (Nev. 1987) ("[E]ven where an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action."); *KOESEL, ET AL.*, *supra* note 40, at 4-8 (explaining that there is no duty to preserve evidence until a case is filed).

and maybe even *after* the first plaintiff is injured if the injury precedes the first complaint letter from a customer.<sup>256</sup>

Two exceptions to this general rule in the case law receive arguably too much attention in the treatises. Consider these in turn.

*b. Carlucci and Selective Destruction.* In *Carlucci v. Piper Aircraft Corp.*,<sup>257</sup> a federal district court excoriated Piper Aircraft for its long-standing practice of selectively destroying flight test records that it thought would be damaging in future lawsuits against unspecified victims.<sup>258</sup> The leading treatise on evidence destruction seems to imply that the court entered a default judgment and assessed fees against Piper based on this upstream, destructive behavior.<sup>259</sup>

But though clearly disapproving of Piper's upstream destruction, the *Carlucci* court was also careful to note, in the same breath, not only that Piper's selective destruction "continued after the commencement of this law suit,"<sup>260</sup> but also that Piper violated several court orders by failing to produce documents that existed at the time the order was issued.<sup>261</sup> Even more, the court found that Piper's foul play extended beyond destruction: it had "consistently disobeyed orders, obstructed discovery, delayed proceedings and made misrepresentations to the court."<sup>262</sup> Piper's upstream evidence destruction may well have been superfluous to the court's imposition of sanctions in this case.

Thus, notwithstanding the court's disapproval of this upstream activity, this district court case is scant authority for the proposition

256. This assumes that no regulation requires the retention of such documents. *See generally* CCH GUIDE TO RECORD RETENTION REQUIREMENTS, *supra* note 148 (cataloguing regulatory retention requirements).

257. 102 F.R.D. 472 (S.D. Fla. 1984), *aff'd*, 775 F.2d 1440 (11th Cir. 1985).

258. *Id.* at 485–86.

259. *See* GORELICK ET AL., *supra* note 12, § 3.12, at 105 (offering Piper's document destruction as an example of "when a party is engaged in a series of lawsuits and destroys evidence after litigating the first lawsuit but before another lawsuit has been filed").

260. 102 F.R.D. at 485–86.

261. *See id.* at 482:

The fact that Piper has not produced a single document (other than the official report) relating to its involvement in the . . . investigation [of the crash] is very damaging in view of defense counsel's representation to [the] Judge . . . that such documents existed. Furthermore, defendant has admitted that it destroyed the originals of the Product Condition Reports . . . despite Judge Paine's order requiring their production.

262. *Id.* at 488.

that such behavior on its own is sanctionable at all, let alone by entry of default judgment against the spoliator.

c. *Lewy and Document “Retention” Policies.* Even to the extent that Piper’s upstream destruction would have been independently sufficient to inspire sanction, Piper may well have avoided the problem by not being as selective (or at least as obviously selective<sup>263</sup>) in its choice of what documents to destroy. Companies often take what is essentially a document *destruction* policy, grant it the semblance of nonselectivity, and dub it a “document retention” policy.<sup>264</sup> The prevalence of such policies<sup>265</sup> is consistent with indications in both scholarly articles and practice guides that the policies help to shield the manipulator against inherent powers sanctions for upstream destruction.<sup>266</sup>

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263. See *id.* at 481 (reciting strong evidence of selective destruction for the purpose of avoiding exposure to liability).

264. Oesterle, *supra* note 12, at 1185–86:

Businesses routinely destroy documents in order to keep the documents out of the hands of opponents in future legal proceedings. An amusing set of euphemisms has grown up around the practice: programs of “preventive maintenance” or “law compliance” include a “document retention” schedule to eliminate “misleading,” “improvident,” or “erroneous” documents for the purpose of “optimizing the position” of the corporation in the event of litigation.

265. For an early discussion of document retention policies in the scholarly literature, see Beckstrom, *supra* note 12, at 688–89. See also GORELICK ET AL., *supra* note 12, § 8.2, at 276 (“The vast majority of large business enterprises now has some formal document-management program.” (citing John M. Fedders & Lauryn H. Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 NOTRE DAME LAW REV. 5 (1980))); Oesterle, *supra* note 12, at 1185–86 (“[M]any corporations purposefully operate programs to destroy evidence . . . primarily to reduce litigation ‘exposure.’”); Solum & Marzen, *supra* note 38, at 1183 (“The routine destruction of documents, often accomplished through formal ‘document management’ programs, has become commonplace.” (citing AM. SOC’Y OF CORP. SEC’YS, INC., SURVEY OF RECORDS RETENTION PRACTICES 2 (1971))).

Document retention programs are even more often the subject of articles in the practice literature. See generally GORELICK ET AL., *supra* note 12, app. A (providing sample policies); *id.* app. B (same); KOESEL ET AL., *supra* note 40, at 16–26 (discussing the importance of documentation retention policies and providing advice on how to implement them); Fedders & Guttenplan, *supra* (providing general advice on document retention policies); Donald S. Skupsky, *Discovery and Destruction of E-Mail*, in *THE INTERNET AND BUSINESS: A LAWYER’S GUIDE TO THE EMERGING LEGAL ISSUES* 47–59 (Joseph F. Ruh, Jr. ed., 1996) (discussing how e-mail messages are stored and can be used against the author, making recommendations about how to handle e-mail).

266. See GORELICK ET AL., *supra* note 12, § 8.1, at 275 (“In most cases to date, courts have refused to sanction destruction of evidence under the auspices of those programs . . .”); KOESEL ET AL., *supra* note 40, at 25 (recommending, as a means of dealing with litigation risk, the implementation of a document retention policy to “include at least annual purging periods when employees must review records under their control and dispose of those that have exceeded their retention periods or are otherwise inappropriate for retention”).

The shield is not invincible. Several courts have expressed a willingness to pierce the veil of routine destruction. The high water mark in this regard is the case of *Lewy v. Remington Arms Co.*<sup>267</sup>

Unloading a particular model of Remington rifle required moving the safety to the fire position.<sup>268</sup> When Lewy did so in his basement, the gun went off, and the bullet went through the ceiling, wounding his mother who was standing on the floor above.<sup>269</sup> To establish a design defect, Lewy introduced similar-incidents evidence consisting of Remington's records of customer complaints and returns prompted by the same model's propensity to fire upon safety release.<sup>270</sup> Lewy also "introduced customer complaint letters, responsive correspondence prepared by Remington, and depositions and live testimony of some of the customers who complained to Remington."<sup>271</sup> Still more similar-incidents evidence—in the form of customer complaints and gun examination reports—had been destroyed by Remington under its document retention policy, according to which "records . . . were kept for a period of three years and if no action regarding a particular record was taken in that period it was destroyed."<sup>272</sup>

Remington's destruction of these records provoked the following jury instruction from the trial judge:

If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.<sup>273</sup>

On appeal Remington argued that this instruction was improper because the destruction had taken place "pursuant to routine procedures."<sup>274</sup> Importantly, the Eighth Circuit did not affirm the trial court's instruction. Rather it announced that it was unable to decide

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267. 836 F.2d 1104 (8th Cir. 1988).

268. *Id.* at 1105.

269. *Id.* But see KOESEL ET AL., *supra* note 40, at 21 (stating that Lewy's bullet hit his wife).

270. *Lewy*, 836 F.2d at 1108. For a lucid discussion of the admissibility of similar incidents evidence, see GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 187–91 (1996).

271. *Lewy*, 836 F.2d at 1108.

272. *Id.* at 1111.

273. *Id.*

273. *Id.* (quoting 3 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 72.16 (4th ed. 1987)).

274. *Id.*

whether the instruction was proper based on the record before it.<sup>275</sup> Having already decided to remand the case for other reasons, the Eighth Circuit provided the court below with a list of three “factors” that it was to consider in determining whether to issue such an instruction, should the plaintiff again request it.<sup>276</sup> First, the court was to consider “whether [Remington’s] three year retention policy [was] reasonable” for “documents such as customer complaints.”<sup>277</sup> “Second, in making this determination the court [could] consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints.”<sup>278</sup> Lastly, the court was to determine “whether the document retention policy was instituted in bad faith.”<sup>279</sup> The Eighth Circuit’s strongest statement against the propriety of Remington’s document retention policy was appended—with ambiguous logical relationship—to the enumeration of these three factors: “[I]f the corporation knew or should have known that the documents would become material at some point in the future then such documents should have been preserved. Thus, a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.”<sup>280</sup>

*Lewy* has received special emphasis in the treatises.<sup>281</sup> In fact, there are several reasons why *Lewy* is less important than one might glean from this elevated position. In the first place, although it was decided a decade and a half ago, *Lewy* has gotten far less play in the courts than it has in legal commentary. Even within the Eighth Circuit, *Lewy* is rarely cited to justify sanctions for upstream destruction under a document retention policy.<sup>282</sup> Outside the Eighth

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275. *Id.* at 1112.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. See, e.g., GORELICK ET AL., *supra* note 216, at 24–25, 47, 363, 364, 368–69, 370–71, 374, 380 (discussing *Lewy*); KOESEL, ET AL., *supra* note 40, at 21.

282. For a limited exception, see *Stevenson v. Union Pacific Railroad Co.*, 204 F.R.D. 425, 432, 436 (E.D. Ark. 2001) where the court granted a permissive adverse inference instruction against Union Pacific for recording over “dispatch tapes” under its document retention policy one year before the case was filed, but after the train crossing accident that killed plaintiff’s decedent. *But see* *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at \*7 (E.D. Ark. Aug. 29, 1997) (declining to grant permissive inference for deletion of relevant e-mails prior to filing of complaint relevant to antitrust suit).

circuit, *Lewy* appears to have been cited for its approach to document retention policies in only one published opinion, *Turner v. Hudson Transit Lines, Inc.*<sup>283</sup> That case, litigated in the Southern District of New York, involved a bus accident on the New Jersey Turnpike and the plaintiff/passenger's allegations that the bus's brakes were faulty.<sup>284</sup> Despite an approving citation in the opinion to *Lewy*'s strongest language, the facts clearly indicate that the defendant/bus company destroyed maintenance records only after the plaintiff filed an amended complaint specifically alleging faulty brakes.<sup>285</sup> Indeed, such destruction was actually in violation of, not pursuant to, the bus company's own "document retention policy."<sup>286</sup>

The second reason to question *Lewy*'s reach is that its language is particularly elastic. Neither the independent meaning of the three factors listed by the court nor their logical relationship has ever been adequately clarified.<sup>287</sup> Merely listing three factors to consider gives no guidance on whether the three factors are to be regarded as independent necessary conditions, independent sufficient conditions, or whether a shortage of one factor may be compensated for with a surplus of another. Similarly, words like "reasonable" are empty shells without application to specific fact patterns.

In the specific fact pattern of the *Lewy* case, the docket shows that on remand the plaintiffs again asked for the adverse inference instruction, but this time the trial judge, a different judge, declined to issue it.<sup>288</sup> Although the new judge provided no justification for this ruling,<sup>289</sup> one may reasonably infer that he considered the Eighth Circuit's three factors and found Remington's document retention practice "reasonable" and not in "bad faith," despite the long list of similar fire-upon-safety-release incidents. This ruling was not appealed: conversations with plaintiffs' lawyers indicate that they let

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283. No. 89 Civ. 4252 (PKL), 1992 WL 51570, at \*3 (S.D.N.Y. Mar. 09, 1992).

284. *Id.* at \*1, \*3.

285. *Id.* at \*2-\*3.

286. *Id.* at \*3.

287. Compare *Stevenson*, 204 F.R.D. at 428 ("This is not a three-part test where each factor must be met, but rather three factors to be considered in determining whether sanctions should be imposed."), with *Concord Boat Corp.*, 1997 WL 33352759, at \*6 ("[T]he Court finds that bad faith is arguably a prerequisite to giving an adverse inference jury instruction. If it is not a prerequisite per se it is definitely the primary factor to consider in weighing the appropriateness of the instruction.").

288. Plaintiff's Proposed Jury Instruction No. L, *Lewy v. Remington Arms*, 836 F.2d 1104 (8th Cir. 1988) (No. 83-3172-CV-S-2).

289. Civil Docket Continuation Sheet at 31, *Lewy* (No. 83-3172-CV-S-2).

the ruling on the instruction slide, focused as they were on what they considered to be more important issues.<sup>290</sup>

The third reason to doubt *Lewy's* significance is that the evidence destruction battle in that case was fought over a non-party-specific, and merely permissive, inference instruction. The battle was not over entry of a default judgment against Remington, nor over striking Remington's answer, nor over imposing sizable monetary sanctions, nor over a ruling on a mandatory inference that the destroyed records were damaging to Remington, nor over a presumption that would shift onto Remington the burden of production on the issue of whether the rifle's design was defective,<sup>291</sup> nor even over Lewy's attorneys' fees incurred in connection with procuring the instruction.<sup>292</sup> As Professor Nesson has argued, it is hard to consider an adverse inference a sanction at all. A negative inference from spoliation seems no worse than the negative inference that the evidence would have inspired had it not been destroyed and instead had been admitted into evidence.<sup>293</sup>

Excepting fee awards, this adverse inference instruction—frequently referred to as the “spoliation inference”—is often the most severe sanction issued under the court's inherent powers when these powers are extended beyond the scope of the Federal Rules of Civil Procedure.<sup>294</sup> Conversely, it is interesting to note that the enumerated

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290. Telephone Interview with Rich Miller, Attorney (Aug. 30, 2002).

291. Cf. Friedman, *supra* note 122, at 1968 (“[I]t is probably rather rare that a case of spoliation is sufficiently serious to justify a true presumption, actually shifting the burden of production, rather than simply supporting the case of the spoliator's opponent.”).

292. Indeed, not only was the punishment merely an adverse inference based on missing evidence, it was also an adverse inference instruction in a case in which the evidence that did make it to the jury—including customer complaints from the immediately preceding three-year period and the testimony and personal records of similarly situated customers who were uncovered by Lewy's lawyers—seems to have been sufficient on its own to support a finding that the rifle was defective. See *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1107–08 (8th Cir. 1988). In this regard, one should note that Lewy and his mother (both plaintiffs in this case) obtained a favorable verdict on remand, without the benefit of the instruction, and were awarded damages totaling \$165,000. *Lewy v. Remington Arms Co*, Judgment in a Civil Case, No. 83-3172-CV-S-4 (W.D. Mo. Jan. 20, 1989).

293. See Nesson, *supra* note 12, at 797. But see Friedman, *supra* note 122, at 1964 (“[M]issing evidence inference is extremely useful and powerful. Its strength lies in large part in its informality . . .”).

294. See *Glover v. BIC Corp.*, 6 F.3d 1318, 1329–30 (9th Cir. 1993) (ordering the lower court on remand to revise the adverse inference instruction given so as not to require a finding of bad faith); *Lewy*, 836 F.2d at 1112 (requiring the lower court on remand to consider several factors regarding Remington's document retention policy before giving adverse inference instruction); *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982)

sanctions under Rule 37(b) for violation of a court order, as discussed above, do not even include the adverse inference instruction.<sup>295</sup> In the context of evidence destruction, the weakest remedy in Rule 37(b)'s list is that the fact finder take as given facts the opponent would have proven with the destroyed evidence.<sup>296</sup> This remedy is quite a bit stronger than inviting the jury to make inferences from an absence of evidence that the jury may have made in any event.<sup>297</sup>

*d. Lewy, Carlucci, and Virtual Filing.* Even if one considers *Carlucci* and *Lewy* to have made inroads into upstream destruction, it is important to note that they both share a particular characteristic that makes the evidence destruction in those cases practically equivalent to destruction after filing. In both cases the defendants had previously faced a series of similar incidents, some of which had resulted in other lawsuits.<sup>298</sup> Both cases concerned defects in product design—in *Lewy*, firing on safety release, in *Carlucci* problems with aerodynamic stability—that had already affected a number of customer/plaintiffs in essentially the same way.<sup>299</sup> In practical effect, notice of the first few suits was as good as notice of the rest to come.

Similarly, in other cases that have stretched the court's inherent powers, the evidence was destroyed prior to filing, but following a serious accident to a specific plaintiff that was likely to lead to

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(upholding lower court's use of adverse inference instruction based on both evidentiary and policy rationales); *Stevenson v. Union Pac. R.R. Co.*, 204 F.R.D. 425, 436 (E.D. Ark. 2001) (instructing the jury that destroyed records would have been adverse to the defendant).

295. See FED. R. CIV. P. 37(b)(2). The court would not be precluded from employing this remedy. See *supra* note 207.

296. FED. R. CIV. P. 37(b)(2)(A).

297. See GORELICK ET AL., *supra* note 12, § 2.8, at 36–37 (arguing that spoliation evidence is relevant and should at least be admitted, if not made the subject of an adverse inference instruction); GORELICK ET AL., *supra* note 216, at 17–26 (same). But see 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5178 (1978) (arguing against admissibility). On balance, courts exercise the same caution in admitting spoliation evidence as they do in admitting evidence of flight. See, e.g., *Caparotta v. Entergy Corp.*, 168 F.3d 754, 757–58 (5th Cir. 1999) (holding inadvertent spoliation more prejudicial than probative under Federal Rule of Evidence 403). Part of this caution derives from the perceived risk of an improper character inference from the bad act of spoliation, for example, to the bad act of unsafe product design. See *id.* at 756 (“[A]n adverse inference drawn from the destruction of records is predicated on bad faith by the defendant.”).

298. See *Lewy*, 836 F.2d at 1107–09; *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 478–79 (S.D. Fla. 1984). This point is emphasized in GORELICK ET AL., *supra* note 12, § 3.12, at 105, which categorizes *Carlucci* in this group of cases, and KOESELL, ET AL., *supra* note 40, at 20–21, which categorizes *Lewy* under a similar heading.

299. *Lewy*, 836 F.2d at 1105; *Carlucci*, 102 F.R.D. at 474.



litigation. In *Stevenson v. Union Pacific Railroad Co.*,<sup>300</sup> for example, the plaintiff's decedent was hit by a train at a railroad crossing. Shortly after the accident, but before filing, the defendant railroad recorded over tapes of concurrent conversations between the train crew and the dispatcher.<sup>301</sup> Arguably, notice of the decedent's death was as good as notice of the survivor's lawsuit.

3. *New Trial and "Fraud upon the Court"*. When foul play comes to light only after final judgment, courts are usually reluctant to reopen the case.<sup>302</sup> The Federal Rules of Civil Procedure make it difficult to reopen the case ten days beyond entry of judgment,<sup>303</sup> and even more difficult after a year has passed.<sup>304</sup> Beyond a year, the only possibility for relief is the court's inherent power to vacate the judgment upon finding that it was obtained by a "fraud upon the court".<sup>305</sup> But "fraud upon the court" is a term reserved for bribery of a judge or, perhaps, fraud perpetrated by an "officer of the court." Plain old spoliation or even perjury by a party or witness is not enough.<sup>306</sup>

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300. 204 F.R.D. 425 (E.D. Ark. 2001).

301. *Id.* at 429-31.

302. *See* Nesson, *supra* note 12, at 798 ("Once a trial is over, the risk from disclosure of previously suppressed evidence diminishes . . . rapidly . . . [I]f you can suppress evidence for a year after the verdict, you are home-free.").

303. *See* FED. R. CIV. P. 59(b) ("Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.").

304. *See* FED. R. CIV. P. 60(b) (stating that relief from a judgment or order based on factors such as mistake or fraud may only be obtained for up to one year following a proceeding).

305. *Id.*

306. *See* 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2870 (3d ed. 1995):

[T]he courts have refused to invoke this concept in cases in which the wrong, if wrong there was, was only between the parties in the case and involved no direct assault on the integrity of the judicial process. Nondisclosure by a party or the party's attorney has not been enough.

The cases in which it has been found that there was, or might have been, a "fraud upon the court," for the most part, have been cases in which there was "the most egregious conduct involving a corruption of the judicial process itself." The concept clearly includes bribery of a judge or the employment of counsel in order to bring an improper influence on the court.

....

Cases of perjured evidence are troublesome. There are a few cases in which the courts have said that this was a fraud upon the court, even in the absence of any suggestion that any officer of the court was a party to the perjury . . . . But there is a powerful distinction between perjury to which an attorney is a party and that with which no attorney is involved.

(footnotes omitted).

### C. *Independent Civil Actions: The Gentle Arc of the Spoliation Tort*

Can a private litigant bring an independent tort action against a litigation opponent for damage to the litigant's case caused by the opponent's evidence tampering?<sup>307</sup> Despite the general position among scholars that such actions should be maintainable,<sup>308</sup> the answer, in most jurisdictions, is "no."<sup>309</sup>

There was some controlled rejoicing when a California trial court recognized an independent tort of spoliation in the mid-1980s.<sup>310</sup> But only a small minority of jurisdictions followed suit.<sup>311</sup> Moreover, in the late 1990s, California's Supreme Court shut down the spoliation tort in that jurisdiction as well.<sup>312</sup> At this point, courts in only about a dozen states have recognized some form of spoliation tort.<sup>313</sup> In fewer

307. Consistent with this Part's focus on the federal system, note first that, in principle, the underlying case might be one that was or could have been brought in federal court. Furthermore, a federal court might obtain subject matter jurisdiction over the derivative spoliation claim by either diversity or supplemental jurisdiction. See 28 U.S.C. §§ 1332(a), 1367 (2000). There is also a federal civil rights cause of action for certain kinds of obstruction of justice. See 42 U.S.C. § 1985(2) (2000).

308. See generally Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891 (1997). See also GORELICK ET AL., *supra* note 12, § 4.1, at 140 ("[D]estruction of evidence itself gives rise to liability rather than enhancing, through inferences and constructive admissions, the likelihood of recovery on some other basis."). But see Friedman, *supra* note 122, at 1981–86 (arguing, in specific response to Porat and Stein, *supra*, that the role for a tort action for evidentiary damage is "quite a narrowly confined one" and probably restricted to cases where evidentiary damage is caused by a third party).

309. See Porat & Stein, *supra* note 308, at 1893 ("Liability for evidential damage is recognized by the law only in exceptional cases, typically involving intentional destruction or suppression of pivotal evidence. Subject to these exceptions, which are yet to crystallize into bright-line rules, evidential damage is generally irremediable.").

310. See *Smith v. Superior Court*, 198 Cal. Rptr. 829, 837 (Cal. Ct. App. 1984) (recognizing the tort of spoliation in a prospective products liability action); see also GORELICK ET AL., *supra* note 12, § 4.3, at 142–43 (citing *Smith* with approval).

311. See generally KOESEL ET AL., *supra* note 40, at 75–172 (reviewing each state's laws as of 2000).

312. See *Temple Cmty. Hosp. v. Superior Court*, 976 P.2d 223, 233 (Cal. 1999) (rejecting tort of third-party spoliation); *Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998) (rejecting tort of first-party spoliation).

313. See generally KOESEL ET AL., *supra* note 40, at 75–172. According to Koesel, the states that currently recognize an independent tort of spoliation include (with qualifications noted): Alabama (only for third-party spoliation, but also for negligent spoliation); Alaska (only for intentional spoliation, not for negligent spoliation); District of Columbia (possibly only for third-party spoliation, but includes both negligent and reckless spoliation); Florida (not yet considered by Florida Supreme Court); Idaho (not expressly adopted); Illinois; Indiana (apparently limited); Kansas (rejected by Kansas Supreme Court, but accepted in "some circumstances" by federal district court applying Kansas law); Louisiana (not yet considered by Louisiana Supreme Court); Montana (limited to third-party spoliation, but includes both

still, has recognition been endorsed by the state's highest court.<sup>314</sup> According to one practice guide, which catalogues the law of all fifty states in this regard, recent decisions "signal a trend away from adopting spoliation of evidence as a separate tort."<sup>315</sup>

Even in those jurisdictions that recognize the tort, its incremental practical effect may be more modest than first appears. Consider, for example, the central case of intentional spoliation by a party opponent.<sup>316</sup> At first glance, the tort seems greatly to expand the set of remedies and sanctions by offering monetary compensation—beyond fee reimbursement—to the victim of the spoliation. But in a sense the set of procedural and evidentiary remedies for foul play do already compensate the victim, albeit in a procedural and evidentiary currency. Such remedies include, for example, taking certain facts as given or allowing an adverse inference instruction.<sup>317</sup> These remedies translate into monetary awards by increasing the chance of a favorable verdict in the underlying case or increasing the level of damages awarded.<sup>318</sup> In principle, then, the spoliation tort, which compensates for expected favorable verdicts foregone,<sup>319</sup> covers the same injury as procedural and evidentiary remedies.<sup>320</sup> It would seem, therefore, that the curative effects of procedural and evidentiary

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negligent and intentional spoliation); New Jersey (not yet considered by New Jersey Supreme Court; lower courts are split); New Mexico (requiring specific and malicious intent); Ohio (only intentional); and Pennsylvania (only for third-party spoliation). *Cf. id.* at 50–51 (producing a similar list). Koesel also indicates that several leading jurisdictions, including New York, California, and Massachusetts, have specifically declined to recognize the spoliation tort. *Id.* at 84–87, 138–40, 117–19.

314. *See, e.g., id.* at 65 (“[T]he Supreme Court of New Mexico recently reaffirmed its recognition of the spoliation tort . . .”).

315. *Id.* at 65–66.

316. *Cf. GORELICK ET AL., supra* note 12, § 4.1, at 140 (describing the creation and evolution of the spoliation tort in common law jurisprudence); KOESEL ET AL., *supra* note 40, at 50–67 (providing elements of the tort of spoliation and recent common law developments relating to the tort).

317. *See supra* Part II.B.

318. *See Holmes v. Amerex Rent-A-Car*, 710 A.2d 846, 853 (D.C. Cir. 1998) (“[I]n an action for negligent or reckless spoliation of evidence, damages arrived at through just and reasonable estimation based on relevant data should be multiplied by the probability that the plaintiff would have won the underlying suit had the spoliated evidence been available.”).

319. *See Petrik v. Monarch Printing Co.*, 501 N.E.2d 1312, 1320 (Ill. App. Ct. 1986) (“[W]hat plaintiffs lost, and what they were to be compensated for, was an ‘expectancy’—the value of the opportunity to win their suit.”).

320. *Cf. Friedman, supra* note 122, at 1984 (arguing the stronger proposition that whenever recovery is warranted under the spoliation tort it would also be warranted in the underlying action).

remedies would have to be subtracted in calculating spoliation tort damages.<sup>321</sup> Possibly, in the spirit of the contractual duty to mitigate,<sup>322</sup> or the tort doctrine of avoidable consequences,<sup>323</sup> attempting to secure preverdict remedies would be a prerequisite for later recovery.<sup>324</sup> Thus, the incremental effect of the spoliation tort must lie in the narrow intersection between those injuries that procedural and evidentiary sanctions could not cure, and those injuries that are nonetheless concrete enough to be compensable in tort.<sup>325</sup>

That said, other potential sources of incremental effect do become apparent when one moves beyond the traditional spoliation model. First, in some jurisdictions the spoliation tort reaches negligent spoliation.<sup>326</sup> Second, in some jurisdictions the tort applies to spoliation by *nonparties*—as when the garage to which the damaged car is towed junks the car despite plaintiff's repeated requests to preserve it for evidence.<sup>327</sup> Third, in some jurisdictions there is authority that the victim of spoliation may bring a separate claim

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321. It appears that no case has addressed this issue directly. Some support is offered by *Strasser v. Yalamanchi*, 783 So. 2d 1087, 1094–95 (Fla. Dist. Ct. App. 2001). In that case, plaintiff joined to an underlying contract claim a spoliation tort claim regarding defendant's behavior in the same suit. Defendant argued that it would be improper for the plaintiff to recover on both claims because this would be in effect double counting. The court responded that it would not be improper to the extent that the spoliation lowered plaintiff's award on the contract claim:

A party significantly impaired by the destruction of evidence may still be able to prevail in an action for breach of contract on the basis of existing evidence, albeit to a lesser extent and for reduced damages . . . [T]he spoliation claim permits recovery for those missing damages that but for [defendants'] destruction of evidence, [plaintiff] otherwise would have been able to prove. The total measure of damages remains the same—namely, the amount of money due [plaintiff] under the contract. *Cf.* Friedman, *supra* note 122, at 1985 (implicitly assuming that subtraction is proper).

322. JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 14.15 (4th ed. 1998).

323. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 65, at 458 (5th ed. 1984) (“The Rule of avoidable consequences comes into play after a legal wrong has occurred, but while some damages may still be averted . . .”).

324. *See Cedars-Sinai Med. Ctr. v. Superior Court*, 954 P.2d 511, 521 (Cal. 1998) (requiring mitigation by raising spoliation issues in the underlying suit); *GORELICK ET AL.*, *supra* note 12, § 4.21, at 165 (stating that the plaintiff must ask “for discovery sanctions or for the spoliation inference in the underlying action” and that “if these remedies prove insufficient, then the spoliation tort action may be brought”).

325. *Cf.* Friedman, *supra* note 122, at 1984 (asserting in effect that this intersection is empty); *see also KOESEL ET AL.*, *supra* note 40, at 53 (finding that courts that decide against recognizing the spoliation tort are primarily persuaded by the “uncertainty of damages,” as well as the existence of other adequate remedies).

326. These are Alabama, Montana, Florida, and the District of Columbia. *KOESEL ET AL.*, *supra* note 40, at 55.

327. *Id.* at 66.

following final judgment in the underlying action when it has learned of the spoliation after it was too late to raise the issue in the underlying action.<sup>328</sup> Nonetheless, if current trends continue, even these incremental effects will be confined to a small and ever shrinking list of jurisdictions.

#### *D. Professional Responsibility*

Rules of professional responsibility and conduct essentially add another layer of sanction to the battery of laws and rules prohibiting evidentiary foul play in the case where the perpetrator is an attorney.<sup>329</sup> In general, however, they do not expand the range of sanctionable behavior.

With respect to evidence destruction, such rules stipulate that attorneys may not “unlawfully” destroy evidence, nor counsel clients to do the same.<sup>330</sup> On its face, this does not reach beyond the laws and

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328. *Id.* at 62–64; Nesson, *supra* note 12, at 798. *See generally* FED. R. CIV. P. 15(b), (d) (allowing amendments to conform to the evidence and supplemental pleadings, respectively). On the other hand, some courts have held that when the victim discovers the spoliation before trial, the victim must join the spoliation claim with the underlying action. KOESEL ET AL., *supra* note 40, at 62–63; *see also* Nesson, *supra* note 12, at 798 (“If efforts to obtain a new trial fail, the spoliation victim might bring an independent suit for the tort of spoliation. Only [a few] states have expressly recognized such a tort, however . . .”).

329. Such sanctions include disqualification from serving as attorney in the instant case, *Briggs v. McWeeny*, 796 A.2d 516, 542 (Conn. 2002); suspension from the practice of law for a fixed period with reentry contingent upon passing the Multistate Professional Responsibility Examination, *Statewide Grievance Comm. v. DeLucia*, No. CV02080512, 2003 WL 1900869, at \*4 (Conn. Super. Ct. Mar. 28, 2003); indefinite suspension, *In re Carey*, 89 S.W.3d 477, 482 (Mo. 2002) (en banc); revocation of attorneys’ *pro hac vice* status, *Bank of Hawaii v. Kunimoto*, 984 P.2d 1198, 1219 (Haw. 1999); disbarment, *Attorney Grievance Comm’n v. Blum*, 818 A.2d 219, 237 (Md. 2003); refusal to grant the offending lawyer’s party’s request to exclude evidence, *Bradley v. Brotman*, 836 So. 2d 1129, 1131 (Fla. Dist. Ct. App. 2003); setting aside of the verdict in the primary suit, *United States v. Adens*, 56 M.J. 724, 735 (A. Ct. Crim. App. 2002); specifying that designated facts be taken as established for purposes of the action, precluding the introduction of certain evidence at trial, striking out pleadings or parts thereof, staying further proceedings pending compliance with an order that has not been followed, dismissing the action in full or in part, entering default judgment on some or all the claims, an award of reasonable expenses, including attorney fees, *In re Anonymous Member of S.C. Bar*, 552 S.E.2d 10, 18 (S.C. 2001); and the imposition of both state and federal sanctions for the same violation, *In re Caranchini*, 956 S.W.2d 910, 914 (Mo. 1997) (en banc). *See supra* note 97 (discussing the common assertion that these rules are rarely enforced—however written).

330. *See* MODEL RULES OF PROF’L CONDUCT R. 3.4 (2002) (“A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.”); MODEL CODE OF PROF’L RESPONSIBILITY DR 7-102(A) (1980) (“In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.”); *id.* DR 7-

rules discussed above. Indeed, the reach may be narrower, because “unlawful” may be interpreted to mean “criminal.”<sup>331</sup> Only one jurisdiction has explicitly made clear that evidence destruction may be sanctionable even where that destruction does not rise to the level of criminal behavior.<sup>332</sup>

Another rule of professional responsibility prohibits conduct that is “prejudicial to the administration of justice.”<sup>333</sup> On its face such a provision might reach beyond unlawful behavior.<sup>334</sup> But despite the advocacy of several commentators, apparently only one jurisdiction has explicitly adopted this broad interpretation.<sup>335</sup>

With respect to the fabrication of evidence, the rules essentially prohibit lawyers from committing perjury when they make representations to the court.<sup>336</sup> Thus when a lawyer perjures herself,

109(A) (“A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.”).

331. See GORELICK ET AL., *supra* note 12, § 7.7, at 258 (questioning whether such rules prohibit only that behavior made unlawful by the criminal law and noting that in some jurisdictions, “the obstruction of justice statute is severely limited or does not extend to civil litigation”).

332. GORELICK ET AL., *supra* note 216, § 7.7, at 358–59 (citing the single jurisdiction, the District of Columbia, which has supposedly broadened the reach of its Rules of Professional Conduct to prohibit “obstruction” of an imminent or pending proceeding, which in any event would seem to be illegal under modern obstruction of justice statutes). *But see* GORELICK ET AL., *supra* note 12, § 7.7, at 255–60 (arguing strenuously that the definition of “unlawful” should be extended).

333. See MODEL RULES OF PROF’L CONDUCT R. 8.4 (“It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice . . .”); MODEL CODE OF PROF’L RESPONSIBILITY DR 1-102(A) (“A lawyer shall not: . . . (5) [e]ngage in conduct that is prejudicial to the administration of justice.”).

334. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 566 (1985) (“Rule 8.4(d) signifies that there are *other* offenses [in addition to crimes or violations of other Model Rules] against a tribunal or against the administration of justice not covered in those Rules.”).

335. District of Columbia Comm. on Prof’l Ethics and Grievances, Op. 119, at 4 (1983). See Solum & Marzen, *supra* note 38, at 1128–30 (referring to the District of Columbia’s application of this provision). Later work by the same authors is not as clear about the rarity of this interpretation. GORELICK ET AL., *supra* note 12, at 261 (using the Missouri case of *In re Bear* 578 S.W.2d 928, 935 (Mo. 1979) as the only “example” of the proposition that “decisions under the Model Code [refused] to limit the duty not to destroy evidence to cases in which such destruction would be unlawful”). Yet in *Bear*, the attorney erased a tape recording of the police’s post-Miranda interrogation of the juvenile suspect, which would seem to be illegal on many scores.

336. See MODEL RULES OF PROF’L CONDUCT R. 3.3 advisory committee’s note 3:

An advocate is . . . usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client’s behalf, and not assertions by the lawyer. . . . However, an assertion purporting to be on the lawyer’s own knowledge, as in an affidavit by the

additional professional sanctions are layered on top of the usual criminal sanctions.<sup>337</sup> Lawyers also have an uncertain obligation to uncover or prevent their clients' perjury—one that is tempered by the “obligation to present the client's case with persuasive force” and the general view that an advocate “is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause.”<sup>338</sup>

### *E. Summary*

Criminal law, civil procedure, tort law, and rules of professional responsibility all prohibit evidence tampering in suits between private parties. From these diverse and tortuous prohibitions two general patterns emerge.

First, all of these sanctions are concentrated far downstream of the litigation-inspiring event: A party may be in contempt of the court only if before the court; Federal Rule of Civil Procedure 37 only comes into play after the complaint has been filed; perjury can only be committed under oath; and the omnibus obstruction of justice provision section 1503 requires that the proceeding be pending. Moreover, with regard to the exercise of inherent powers, a careful reading of the cases indicates that the courts have been reluctant to exercise such powers to sanction pre-filing destruction. This reluctance is all the greater when no specific plaintiff looms on the horizon. *A fortiori*, document “retention” policies that are not specifically directed at destroying potentially damaging records appear to remain a largely effective means of insulating document destruction from this source of sanction. Even section 1512(c), the newest obstruction of justice provision, which makes general obstructive behavior criminal even when there is no pending proceeding, may not extend to defendants who destroy evidence as part of routine document “retention” policies, or who, more generally, do not have a specific suit with a specific opponent in mind.

Second, even in the downstream reaches of the litigation flow wherein tampering is punished, the farther downstream the

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lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.

337. *Id.* scope (“Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.”).

338. *Id.* R. 3.3 advisory committee's note 2.

tampering, the more far reaching the prohibition. Of the two perjury statutes, for example, section 1623, which prohibits lying only in judicial proceedings and depositions, is in other respects broader in scope than its counterpart section 1621, which applies any time a statement is made under oath. Likewise, the fact that contempt may be summarily imposed corresponds with its use far downstream.

A similar pattern emerges from the untidy array of procedural and evidentiary sanctions. Here Federal Rule of Civil Procedure 37(b) and inherent powers stand out as the main sources of sanctioning authority in practice. A court order to compel discovery under Rule 37 is only issued at the insistence of the opposing party. But if that order is later violated penalties will be summarily and almost certainly imposed. If the court wishes to punish tampering somewhat farther upstream, it must use its inherent powers. The imposition of sanctions under this authority is hardly summary. The court must find that the offender had a “duty” to preserve the evidence, an inquiry which implicates the “reasonableness” of the destruction as well as the nexus between the destruction and the litigation. Moreover, as compared to the list of sanctions laid out in Rule 37(b), the typical inherent powers sanction is relatively lenient—an adverse inference instruction, which would seem to place the spoliator in the same position she would be in if she had not spoliated.

### III. IS THE LAW TOO LAX?

According to your grandfather, a job worth doing is a job worth doing well. According to your management consultant, 20 percent of the effort yields 80 percent of the results. Neither admonishment, of course, is as universally valid as these advisors make it seem. The right amount of effort to devote to a task depends upon the relative trajectories of costs and benefits as effort is increased. Sometimes, for example, the benefits quickly level off, and 20 percent is nearly as good as 80 percent, at one quarter the cost. Sometimes, in contrast, the benefits are initially elusive, and 80 percent, though four times more expensive, is fifty times more effective.

When it comes to society’s task of policing evidentiary manipulation, the trajectory of social benefits is starkly dependent on what one takes to be the object of trial. This in turn produces significant differences in what one views as the right amount of anti-tampering enforcement. As shown in this Part, under the conventional view of trial as a search for truth, there is good reason to



believe that the effectiveness of anti-tampering enforcement grows, over much of its range, with each additional degree of effort devoted to the task.<sup>339</sup> It follows that, from a truth-finding perspective, policing evidentiary foul play is likely to be one of those jobs that is worth doing well, if it is worth doing at all.

And yet, your grandfather would probably be disappointed by the current system of anti-tampering enforcement. As demonstrated in Part I, the law apparently regards antimanipulation enforcement as a job worth doing halfheartedly. One possible response is to conclude that the litigation system is now, and has been for some time, in a state of fundamental disrepair. An alternative reaction, however, is to entertain the possibility that uncovering microhistorical truths about past transactions and occurrences is not, in fact, the primary purpose of trial—that trial’s primary purpose lies not in discovering what happened, but in shaping what happens.

Shifting perspective from already filed cases to still undecided conduct does in fact raise the very real possibility that the current system is more savvy than sloppy. As this Part establishes, if trial is regarded as but one component of a larger mechanic directed at shaping everyday behavior, the effectiveness of anti-tampering enforcement declines with each additional degree of effort devoted to the task. It follows that, from a primary activity incentive perspective, anti-tampering enforcement may very well be a job worth doing “poorly”; a task for which 20 percent of the effort does indeed yield 80 percent of the benefit.

Although fleshing out the foregoing claims is a central purpose of this Part of the Article, a number of other points of independent interest lie en route, and these will also be developed.

As the preceding discussion suggests, the key to comparing optimal enforcement levels under alternative social objectives is to compare how the *incremental* social benefits of additional enforcement depend upon the current *level* of enforcement. But before understanding how incremental benefits *change*, one must first understand their source and nature. This is the object of this Part’s first Section. Section A establishes that such incremental benefits are markedly different depending on whether one views truth-finding or primary activity incentive-setting as the object of trial.

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339. See *infra* Part III.B.

The analysis in Section A has independent conceptual interest apart from its role in the comparison of optimal enforcement levels. It adds to our understanding of the extent to which primary activity incentive setting is not—as most would assume<sup>340</sup>—an ally for truth-seeking in the competition among social objectives that shapes procedural and evidentiary law.

After establishing this difference in the nature and source of incremental social benefits, the analysis moves on to examine the implications of this difference for the law of anti-tampering enforcement. Section B returns to the comparison of how the incremental benefits of additional enforcement depend on the current level of enforcement. Based on this comparison, it concludes that the law's halfhearted regulation of evidence tampering is far more easily reconciled with a primary activities approach to trial than with the conventional conception of that institution as a truth-seeking exercise.

Section C then considers the optimal *method* of enforcement, as opposed to its optimal *level*. The inclusion in this Part of some discussion of the law's chosen method of enforcement is warranted by the fact that some portion of the general claim that the law is too lax is probably best regarded as a criticism of enforcement method, rather than overall enforcement intensity. Consider, for example, the claim, examined in Part I, that too few perjurers are caught. This claim by itself is incomplete as a statement about the overall intensity of enforcement because it does not take into account how much the law invests in sanctioning those who *are* caught. The claim gains coherence, however, if it is interpreted as a criticism of the law's chosen balance between sanction level and detection frequency—in particular, that the law relies too little on detection and too much on sanction. Likewise, commentary that specifically derides the law's refusal, as discussed in Part II, to go back and correct tampered litigation outcomes is directed not at the law's overall enforcement level, but at the fact that the law has chosen to downplay a particular type of remedy. Section C of this Part concludes that both of these aspects of the law's chosen method of enforcement—its de-emphasis on both detection and correction—are also more easily reconciled with primary activity incentive setting than with truth-finding. Thus whether one measures laxity in levels or in methods, the primary activity approach is a better fit for the data of existing law.

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340. See, e.g., *supra* note 14.

Many of the arguments made in this Part are supplemented by discussion and formal analysis in the Appendix.<sup>341</sup>

*A. The Purpose of Policing Evidence Tampering*

1. *Thought Experiment.* To fix ideas, we will focus throughout this Part on the following thought experiment involving the law of product liability. Upstream, in the primary activity, a manufacturer decides whether to adopt a safe design for its product. Downstream, closer to, or even during litigation, the manufacturer decides whether to destroy documents relevant to product safety, including, for example, those produced by product testing.<sup>342</sup> The question for consideration in this Section A: what are the social benefits of marginally increasing the expected sanction for document destruction in this setting? In particular, how do the social benefits of this policy differ when the object is to provide incentives for safe product design rather than to find the truth about whether a safe design was adopted?

2. *A Taxonomy of Potential Evidence Tamperers.* The best place to begin the analysis is downstream, with the following inquiry: when would the manufacturer destroy evidence? No doubt, the moral sensitivity of managers and employees is one determinant. But, given the focus here on Holmes' "bad person,"<sup>343</sup> let us consider a colder calculus. Thus, imagine that the manufacturer destroys documents when it believes that the documents' expected impact on the outcome of prospective litigation would be unfavorable enough to justify bearing the expected private costs of the destruction.<sup>344</sup>

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341. The Appendix considers several important details and caveats, including 1) the role played by the trajectory of social costs, 2) the role of the "infra-marginal *nontamperer*," as defined within, and 3) the role played by changes in the density of "marginal tamperers," also as defined within. *See infra* app.

342. This hypothetical is evocative of several prominent cases of evidence destruction. *See, e.g.,* *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1111–13 (8th Cir. 1988); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 549–51 (D. Minn. 1989); *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 485–86 (S.D. Fla. 1984). *See supra* Part II.B.2 for a detailed discussion of these cases.

343. *See supra* note 44 and accompanying text.

344. This calculus is suggested in some of the practice literature. *See* GORELICK ET AL., *supra* 12, § 9.1, at 298 ("[I]f the content of certain documents is worse than the inference that would be drawn from their destruction and there is no current, pending, or imminently foreseeable request for them, they may be destroyed."). *See also* Nesson, *supra* note 12, at 794–805 (reviewing the "bad man's" decision to spoliage).

The impact of evidence destruction on the outcome of the litigation depends on the degree to which the outcome of the case hangs on the kind of evidence that the manufacturer is considering destroying. This, in turn, depends on the magnitude of the damages at issue in the suit as well as the chance that the evidence to be destroyed would be decisive in determining what, if any, damages are imposed.

The manufacturer's private cost of evidence destruction, on the other hand, includes both the expected losses from any ancillary litigation punishing the destruction—including both the expected outcome of this satellite litigation and the expected costs of lodging a defense therein—and the cost of any additional activities undertaken in an attempt to avoid such secondary litigation losses—such as would be incurred in destroying the evidence of the destruction itself.

Both in terms of perception and reality, these private costs and benefits of destroying documents will differ widely across manufacturers. But given any level of anti-tampering enforcement, it suffices for our purposes to identify three “types” of manufacturers. First, there are the marginal tamperers: those for whom tampering is just barely worthwhile given their perception of the current array of private costs and benefits.<sup>345</sup> Second, there are the inframarginal tamperers: those for whom the private benefits of tampering exceed the private costs by a discreet amount so that they would continue to tamper despite any marginal increase in the private cost of doing so borne from additional enforcement. Last are the inframarginal nontamperers: those who choose not to tamper and would continue to make the same choice even were anti-tampering enforcement reduced on the margin.

With this typology in place we will now review the benefits of increasing anti-tampering enforcement in terms of how it affects each of these classes of manufacturers. In particular, because truth-finding and primary activity approaches divide mainly over their effects on the first two types—the marginal and inframarginal tamperers—we will focus on these in the analysis to follow. First, we consider the benefits of increasing anti-tampering enforcement under the truth-finding approach, and then, under the primary activity incentives approach.

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345. Put another way, a “marginal tamperer” is a tamperer that stops tampering in response to either a marginal decrease in the private benefits of tampering or a marginal increase in the private costs.

3. *Truth-Finding Benefits of Anti-Tampering Enforcement.* The truth-finding benefits of a marginal increase in anti-spoliation enforcement come from two sources. First, the marginal tamperer stops destroying documents. Because these documents now make it to court, the verdict imposed will tend to be closer to the ideal verdict in these cases. Second, increasing anti-tampering enforcement also has an inframarginal truth benefit. Additional enforcement effort not only prevents spoliation, it may also increase the frequency with which document destruction is detected. When such destruction is detected, case outcomes can be rectified—e.g., by means of a spoliation inference instruction.<sup>346</sup>

4. *Primary Activity Benefits of Anti-Tampering Enforcement.* The primary activity incentive to adopt a safe design is generated by a combination of two factors. First, there is the array of anticipated litigation payoffs contingent on ending up as each possible type of downstream tamperer. Second, there is the manner in which choosing a safe, rather than unsafe, design affects the likelihood of ending up as each kind of tamperer. A policy change increases the incentive for safe design to the extent that it worsens the payoffs of types that are more likely following unsafe design and improves the payoffs of types that are more likely following safe design. Consider, for example, what would happen to primary activity incentives if a policy change worsened the litigation position of the inframarginal tamperer, all else the same. If adopting a safe design minimizes the likelihood of ending up as an inframarginal tamperer, this policy change would increase the incentive to adopt a safe design.

a. *Converting the Marginal Tamperer.* As noted, increasing the private cost of evidence destruction will cause the marginal tamperer now to refrain from destroying evidence. But the fact that this marginal tamperer has markedly changed its behavior does not mean that its litigation payoff—as the manufacturer perceives this potential payoff from a primary activity perspective—has also markedly changed. In fact, its litigation payoff will remain virtually the same. While it is true that the verdict and remedy imposed in the primary litigation are now more likely to go against this manufacturer for the fact that it is no longer destroying these documents, it is also true that this manufacturer is no longer engaging in the evidence destruction

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346. See Part II.B.2, *supra*, for a description of this device.

and so is no longer facing the expected private costs of this form of obstruction. Because this tamperer is marginal—i.e., because it had perceived destruction’s private benefits to be roughly commensurate with its private costs—these two effects cancel each other in their effect on the tamperer’s all-in litigation payoffs. Thus, increasing the private cost of evidence destruction merely transmutes the marginal tamperer’s litigation loss from the private cost of evidence destruction to the private cost of worsened litigation outcomes.<sup>347</sup>

The crucial point here is that the primary activity incentives created by litigation are as much a matter of private litigation costs as of litigation outcomes—an aspect of the primary activity approach that distinguishes it from the verdict centrism of the truth-seeking approach. From the prospective litigant’s perspective, as it is choosing its behavior in the primary activity, the principal concern is the degree to which it would be worse off in litigation if it chooses the “bad act”: in the example at hand, marketing an unsafe product. Whether the litigant is worse off for having to “pay” expected private destruction costs, or worse off for having to pay in the form of a less favorable expected verdict is immaterial. Supposing, on the contrary, that the manufacturer in the example cares more about dollars in the form of damages than it does about dollars in the form of tampering costs is like imagining that the manufacturer plans its affairs with only gross income in mind, ignoring the effect of taxes.

Thus, to the extent that the potential litigant anticipates that it is either more or less likely to be a marginal tamperer as a result of “misbehaving” in the primary activity, its incentive to refrain from the bad action remains essentially the same after anti-tampering enforcement is increased.

It may well be that the most salient, dramatic and, morally uplifting aspect of heightened anti-tampering enforcement is its ability to make an honest litigant out of the spoliator. And, in fact, it *is* true, as noted, that this is one of the two important functions of anti-tampering enforcement when truth-finding is taken to be the purpose of trial. From the perspective of setting primary activity incentives, however, the social benefit of additional enforcement effort cannot derive from its ability to convert the marginal sinner

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347. This analysis continues to hold when, realistically, the manufacturer’s interest in the outcome of the present suit reaches beyond the current litigation to suits by future plaintiffs. Accounting for future litigation just requires a redefinition of who is marginal. By the same logic, it continues to hold under a variety of fee- and cost-shifting rules.

into the marginal saint. If there is a social benefit of additional enforcement, it must lie elsewhere.

*b. Taxing the Inframarginal Tamperer.* Counter to intuition, the main primary activity incentive benefits of additional enforcement come mainly through the effect on those whom the additional enforcement fails to deter. These inframarginal evidence destroyers, though they continue to destroy evidence in the face of additional enforcement, are positively worse off in litigation due to the enhanced enforcement.<sup>348</sup> To the extent that safe design lessens the manufacturer's chance of ending up in this worsened position, the incentive to choose a safe design increases.

In more detail, increased anti-tampering enforcement reduces the inframarginal tamperer's litigation payoffs for several reasons. First, the tamperer is more likely to be called to task for its destruction in a secondary proceeding. This means not only that it is more likely to face sanctions in satellite litigation, but also that it is more likely to have to pay the cost of defending itself against an obstruction indictment or a motion for procedural or evidentiary sanctions. Second, in the primary layer of litigation, to the extent that the probability of detection is increased, spoliation will be less often successful at improving litigation outcomes. Thus, the inframarginal spoliator will now be partially denied access to what was a relatively cheap method of minimizing litigation losses. Third, prior to the primary litigation, the inframarginal tamperer will now be inclined to expend additional effort in perpetrating her destruction in order to avoid detection and sanction.

Reducing litigation payoffs for the inframarginal tamperer improves the manufacturer's primary activity incentives to the extent that choosing an unsafe product design makes it more likely that the manufacturer will find itself in the position of the inframarginal tamperer in prospective litigation. Because it is now a worse fate to

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348. Several commentators have brushed lightly against this point's outer reaches. *See, e.g.,* GORELICK ET AL., *supra* note 12, § 1.15, at 19 (“[A] strict [document destruction] regime could generate a . . . chilling of the production of useful documentary evidence . . . . Chilling the creation of documents evidencing unlawful activity, however, directly increases the cost of lawbreaking itself.”); Beckstrom, *supra* note 12, at 717 (discussing author's proposed statute requiring retention of antitrust documents: “[T]he proposed statute would not completely frustrate those who would purposefully violate the substantive laws. Refuge could often be found in the simple expedient of not making records. At least this route would be inconvenient for them because it is usually better business practice . . . to make [such a] record . . .”).

end up as an inframarginal tamperer, anything that the manufacturer can do in the primary activity to avoid this fate seems more attractive. Choosing the good primary activity action rather than the bad is one of these things. The good primary activity action is less likely to emit damaging evidentiary emissions and more likely to emit favorable emissions. Thus, the manufacturer who adopts a safe design upstream predicts that it is less likely to find evidence destruction worthwhile downstream.

Drawing an analogy to tax policy may be helpful here. Increasing anti-spoliation enforcement is like taxing manufacturers who find themselves in the position of the inframarginal spoliator. Because manufacturers who adopt unsafe designs are more likely to find themselves in this position, taxing inframarginal spoliators is like taxing (albeit probabilistically) the design of unsafe products. A tax on unsafe design is, of course, an incentive to adopt a safe design. It is important to note, however, that this is a tax paid in secret. The court may never learn that the product was unsafe or that the manufacturer is paying additional costs for its evidence tampering as a result of its design choice.

Another way to see the same point is to recognize that safe design is like a substitute (in the economic sense) for document destruction in generating the manufacturer's expected payoffs in product liability litigation. Spoliation and safe design are two ways to increase expected product liability litigation payoffs. Both have a price, however. The price of spoliation includes the legal risk therefrom. The price of adopting a safe design includes the reduction in profit margins from not cutting corners. When the price of spoliation is increased—via increased anti-tampering enforcement—we can expect the manufacturer to shift toward other methods of avoiding product liability litigation outcomes. One of these is to choose a safe product design.

5. *Summary.* The *truth* benefits of marginally increasing anti-tampering enforcement are twofold: (1) the additional information that flows into the court as a result of converting the marginal tamperer to honest evidence production, and (2) the additional information that flows into court because those who still insist on tampering are more often caught in the act.

In contrast, if the object of trial is to set primary activity incentives, converting the marginal tamperer is essentially of no consequence. Under this objective, the social benefits from enhanced



enforcement come primarily from worsening the downstream payoffs of those who find the higher cost of tampering still worth incurring, a situation more likely to arise following choice of an unsafe design upstream.

*B. The Optimal Enforcement Level*

Having established the different nature and source of incremental social benefits under the truth-seeking and primary activity approaches, we now move on to examine how these different incremental benefits *change* as the level of enforcement is increased. From this analysis we draw our main conclusion about differences in the optimal level of enforcement.

The Section begins by establishing that the social benefits of anti-tampering enforcement are self-dampening under a primary activity approach to trial. It then moves on to explain why the social benefits of anti-tampering enforcement are self-enhancing under the conventional truth-finding approach to trial. It concludes by examining the implications of these findings for the optimal level of anti-tampering enforcement under each alternative social objective.

1. *Self-Dampening Primary Activity Benefits.* Section A.4.b established that the primary activity benefits of increased anti-tampering enforcement accrue mainly through increasing the effective tax on inframarginal tamperers. The impact of increasing this tax depends on the chance that the bad action (more so than the good) puts the actor in a position wherein she chooses to pay this tax—that is, puts her in the position of the inframarginal tamperer, wherein the potentially unfavorable effect of a given piece of evidence on the case’s outcome still outweighs the private costs of destroying that evidence.

The primary activity benefits of additional enforcement are self-dampening because the greater the level of anti-tampering enforcement, the lower the chance of ending up in this position following unsafe design. To take an extreme example, when anti-spoliation enforcement is particularly aggressive, the bad primary actor simply does not expect to find herself in a position where spoliation would still be worthwhile. The benefits from spoliation would have to be improbably high. Therefore, any decrease in prospective litigation payoffs in this attenuated contingency is unlikely to cause her to change her primary activity behavior. More generally, the greater the current level of anti-tampering

enforcement, the smaller the chance that the bad actor will end up in a position where tampering is still worthwhile, and the smaller the effect on primary incentives of additionally raising the cost in this contingency.<sup>349</sup>

2. *Self-Enhancing Truth Benefits.* The self-dampening dynamic just described follows from the hypothesis that primary activity incentive setting is the main purpose of litigation. When the same analytical hardware runs the more conventional program of truth-seeking, the outputted dynamic is likely to be self-enhancing rather than self-dampening. The more the legal system is currently doing to prevent evidence tampering, the greater the incremental benefits of further increasing prevention.

As noted in Section A.3, the truth benefits of anti-tampering enforcement come mainly from two sources: conversion of the marginal tamperer and the corrective effect on trial outcomes of nabbing the inframarginal tamperer. Let us now review these in turn with an eye toward how these positive effects change in magnitude as anti-tampering enforcement increases. As we shall see, the former conversion effect is markedly self-enhancing over the relevant range, whereas the latter corrective effect is likely neutralized by a crosscurrent of conflicting forces.

a. *Converting the Marginal Tamperer.* Recall that when we throw an additional dollar at anti-tampering enforcement, we deter the marginal tamperer. Because the marginal tamperer is no longer misleading the fact finder, the verdict actually imposed is closer to the ideal verdict in these cases.

But how much closer? That depends on the expected impact that the marginal tamperer's spoliation was having on the outcome of the case. Importantly, this impact is likely to be larger the greater the current level of enforcement.

As we begin to increase the private cost of spoliation starting from a low level, we tend to discourage those who believe that spoliation has only a moderate impact on case outcomes. As we continue to increase the private cost of spoliation, our converts to honesty are those who believe that their evidence destruction would

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349. When there is a nontrivial chance that safe product designers may also find tampering worthwhile, the primary activity benefits of additional anti-tampering enforcement need not be *monotonically* self-dampening. Yet they will still be self-dampening in general trend. *See app.*

have had a greater and greater effect on the court's findings of fact. As we drag the net farther and farther out to sea, in other words, we catch bigger and bigger fish. The conversion of each additional spoliator, thus, has a greater and greater benefit in terms of aligning actual case outcomes with ideal case outcomes. And therefore, the more we have already increased anti-tampering enforcement, the more attractive it is to increase enforcement even further.<sup>350</sup>

*b. Nabbing More Inframarginal Tamperers.* Additional enforcement effort not only prevents evidence destruction, it also leads to more frequent detection when destruction still occurs. If the authorities actually catch a greater number of inframarginal spoliators, then a greater number of case outcomes can be corrected. In determining the trajectory of the truth-finding benefits of anti-tampering enforcement, this second effect must also be considered. But unlike the effects considered thus far, this effect is fundamentally ambiguous.

In one respect, the effect is self-dampening. The greater the current level of anti-tampering enforcement, the fewer individuals are currently spoliating. Like fishing on an overfished lake, additional enforcement effort is less likely to have much corrective benefit when remaining situations in need of correction are scarce and difficult to find.

And yet, in another respect, the effect is self-enhancing. As the set of inframarginal tamperers diminishes due to increasing enforcement, authorities may be able to more effectively target their

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350. Indeed, in a schematic version of this argument, the truth benefits of beefing up anti-tampering enforcement increase exponentially in the current level of enforcement. If the expected private cost of evidence destruction is \$1,000, then the marginal spoliator expects that her spoliation will change the outcome of litigation by \$1,000. Increasing her cost of spoliation starting from \$1,000 thus results in an expected increase in trial accuracy of \$1,000 for this marginal spoliator. Similarly, increasing the cost of spoliation starting from \$2,000 increases expected trial accuracy by \$2,000 per marginal spoliator. And increasing the cost of spoliation starting from \$1,000,000 increases expected trial accuracy by \$1,000,000 per marginal spoliator.

Of course, the truth benefits of additional enforcement do not accelerate *ad infinitum*. Eventually the private cost of spoliation becomes so high that marginal tamperers are few and far between. Thus, while the incremental truth benefits per marginal tamperer continue to rise, the total incremental truth benefit of increasing the cost of tampering eventually stops climbing and begins to fall. But, almost by definition, this tapering off will not become decisive until the level of enforcement effort is well beyond the middling range. Thus, it plays no role in the explanation for why a middling level of enforcement intensity is inconsistent with a truth-telling approach. Over the relevant range for the present analysis, the truth benefits of anti-tampering enforcement accelerate as anti-tampering enforcement effort is increased. *See app.*

detection and enforcement effort. Authorities can focus on the now smaller set of litigants where the apparent stakes from spoliating appear to be high enough to make the destruction of evidence still worthwhile. With enforcement resources no longer spread so thin, leads can be followed in greater depth. Thus, although a smaller inframargin does imply that there are fewer spoliators, it also implies that a larger percentage of this smaller number can be caught.

In the end, the presence of these two countervailing effects makes it impossible to say whether the inframarginal truth benefits of additional enforcement are self-enhancing or self-dampening. The existence of opposing forces, however, does perhaps create a presumption—albeit one rebuttable by empirical investigation—that inframarginal truth benefits are not so largely self-dampening on net as to overwhelm the self-enhancing effect concerning marginal tamperers, as explained above.

3. *The Optimal Level of Anti-Tampering Enforcement.* We have seen that the primary activity incentive benefits of anti-tampering enforcement are self-dampening, while the truth-finding benefits are self-enhancing. Intuitively, this suggests that the optimal level of anti-tampering enforcement is lower under the primary activity approach than under the truth-finding approach. In fact, the logical implication is not so bold, but still quite informative. While a middling level of anti-tampering enforcement is consistent with the primary activity approach to trial, it is inconsistent with the truth-finding approach. Because the truth benefits of additional enforcement are self-enhancing, if it were worthwhile increasing anti-tampering enforcement to a middling level, it would also be worthwhile continuing to increase it. Whatever the size of the incremental benefit that convinced us to turn the enforcement dial from low to medium, an even greater incremental benefit accrues to turning the dial from medium to high.

To be precise, the claim is not that we would necessarily want to turn the dial from low to medium, but only that *if* we did so we would not want to stop there. Thus, the analysis tells what optimal enforcement cannot be (medium) and not precisely what it is (as between low or high). In other words, the conclusion is that, from a truth-finding perspective, anti-tampering enforcement is indeed a job worth doing well, if it is worth doing at all.

In contrast, if the object of trial is to set primary activity incentives, then a middling level of enforcement *is* a plausible

candidate for the social optimum. Quite possibly, by the time we reach this middling level, the self-dampening primary incentive benefits of additional enforcement have fallen to such extent that additional enforcement effort would not be worthwhile. Quite plausibly, therefore, a modicum of effort yields most of the results.

### C. *The Optimal Method of Enforcement*

As noted, when commentators bemoan the law's apparent laxness with regard to evidence tampering, some part of this concern goes not to general enforcement levels, but to specific enforcement methods. In particular, the infrequency with which tamperers are called to task, as well as the law's reluctance to go back and correct distorted litigation outcomes are specific sources of dismay—sources which are logically distinct from overall enforcement intensity. This Section discusses both the frequency of detection and the importance of correcting litigation outcomes. As with general enforcement intensity, it concludes that the law's current practice is far better aligned with primary activity incentive setting than with truth-finding.<sup>351</sup> After analyzing these issues under each approach in turn, the Section compares the results of these analyses to existing law.

1. *Truth-Finding.* As noted in the previous Section, the truth benefits of anti-tampering enforcement derive not just from deterring the tampering, but also from uncovering the tampering activity of the inframarginal tamperer and correcting the effect of this tampering on the underlying proceeding. This has implications for both the proper frequency of detection and the corrective nature of tampering remedies.

With regard to the frequency of detection, it is well known that deterrence is the product of both this frequency and the sanction imposed conditional on detection. Many considerations go into determining the proper mix of these two factors. But when the undesirable action is evidence tampering, and one takes a truth-finding approach to trial, an additional reason is added to the list of those favoring detection frequency over sanction magnitude.

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351. That primary activity and truth-finding approaches have different implications for the method of enforcement justifies the implicit qualification in this Article's introduction that the social costs are only "roughly" the same across the two approaches. *See supra* note 16 and accompanying text.

To see this, consider raising the sanction on evidence tampering while lowering the frequency of detection, in such manner as to hold constant the generated level of deterrence. The proponent of truth-finding would not be indifferent to this rearrangement. Although the same number of marginal tamperers are converted to honest litigants—and, as noted, this is a boon for truth-seeking—those who still choose to tamper are less frequently caught, and the outcome of litigation is more frequently in error. Thus, all else the same, the proponent of truth-finding prefers to deter with a high rate of detection rather than a high level of sanction. For truth-finding, the former method kills two birds with one stone by both preventing tampering and more frequently allowing it to be corrected.

Part and parcel with the fact that it leans toward detection frequency, the truth-finding approach also has an additional reason to prefer that the sanctions themselves are corrective of underlying litigation outcomes. Merely fining spoliators, for instance, does nothing to correct litigation outcomes that have already been skewed by the spoliation.

2. *The Primary Activity Incentives Approach.* The primary activity approach lacks the same impetus both to emphasize detection frequency over sanction level, and specifically to correct skewed litigation outcomes. From a primary activity perspective, the best way to raise the private cost of tampering is simply that which incurs the lowest social cost. All that is important is that from an ex ante viewpoint, the primary activity actor anticipates worsened litigation outcomes for inframarginal tamperers. For the purpose of influencing the actor's primary activity choices, precisely how this tax is imposed—aside from the issue of how much its imposition costs the public—is of secondary importance.<sup>352</sup>

Consider how this imbues the primary incentive proponent with a different attitude toward the two enforcement-method issues considered in this Section. First, in terms of the balance between detection probabilities and sanction levels, the primary activity proponent faces a trade-off in generating the tax on inframarginal tamperers that is similar to that faced by the proponent of truth-finding. But the primary activity proponent lacks the truth-seeker's

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352. This point is related to one made in Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191, 192–93 (1996) (finding that courts should impose ex ante expected damages on injurers, rather than actual ex post damages).

additional reason to favor detection over sanction level: namely, the desire to correct as many litigation outcomes as possible. Thus, in choosing how best to produce a given expected sanction for tampering, the primary activity approach suggests a lower optimal frequency of detection and a higher optimal sanction relative to the truth-seeking approach.<sup>353</sup>

Secondly, it is clear that when sanctions *are* imposed for evidence tampering, the primary activity approach also has less concern for whether those sanctions actually correct past litigation outcomes. This is not to say that the primary activity approach has no concern for correction.<sup>354</sup> The point is rather that the primary activity approach lacks the additional impetus to correct litigation outcomes implied by the truth-finding approach. And thus to the extent that primary activity considerations are predominant, one would expect to see less of an effort to correct outcomes.

3. *Existing Law and Practice.* Existing law and practice seem more in line with the primary activity approach on both scores. In terms of the balance between frequency of detection and size of sanction, there is some indication that perjury and obstruction are rarely punished, especially in civil actions between private parties.<sup>355</sup> And yet, as noted in Part I.B, when these activities are punished, the sanctions are relatively high. The sentence in the federal system for

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353. It would not be correct to conclude that the primary activity approach would favor driving detection probabilities to zero and sanctions to infinity, despite how the theory of enforcement is sometimes caricatured. For example, because it raises the procedural and evidentiary effort expended by the parties, *see* Kakalik et al., *supra* note 91, at 634–50, raising sanctions is not in fact a costless alternative to raising detection probabilities. This point has recently been explored in relation to the question of whether what plaintiffs recover should equal what defendants pay in damages. *See* Marcel Kahan & Bruce Tuckman, *Special Levies on Punitive Damages: Decoupling, Agency Problems, and Litigation Expenditures*, 15 INT'L REV. L. & ECON. 175, 175–76 (1995) (questioning the effectiveness of “special levy” statutes, which “require plaintiffs to hand over portions of their punitive damage awards to the state”); A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562, 562–63 (1991) (advocating “decoupled liability,” whereby “the plaintiff is awarded an amount different from what the defendant is made to pay,” as a method for reducing social costs); Albert Choi & Chris W. Sanchirico, *Should Plaintiffs Win What Defendants Lose?: Litigation Stakes, Litigation Effort, and the Benefits of Decoupling*, 33 J. LEGAL STUD. (forthcoming June 2004) (considering “the infra-marginal effects of both decreasing recovery and increasing damages”).

354. The incentives of plaintiffs and victims must also be considered, and such incentives may be enhanced if these parties are confident that the impact of the defendant’s false evidence will be nullified.

355. *See supra* Part I.B.

either obstruction or perjury is at least ten to sixteen months in prison.<sup>356</sup> The reputational and economic sanction—both short- and long-term—that this entails looms large for the average litigant who happens, for example, to be in court defending her firm's failure to perform on a contract, or her firm's apparent lack of care in designing a potentially hazardous product. The loss of future income from serving a prison term would pale in comparison to whatever this agent of the firm stood to gain—in terms of short-run profits or career advancement—by shorting the customer or cutting corners on product design.

Furthermore, as noted in Part II, when sanctions are imposed under current law, they rarely correct the underlying litigation result. Conceivably, on convicting litigant *X* for obstruction of justice for destroying documents during pending litigation, the law might sanction her by going back to correct the outcome in the case that she won by virtue of this destruction. Making her pay back what she won in that case would be one way to fine her. But this rarely happens. Unless there has been a “fraud upon the court”—which, as noted, means more than mere obstruction by a private litigant—or the obstruction is caught within a year after entry of judgment, that judgment will generally stand, even as the convicted obstructer is sentenced to time in prison.<sup>357</sup>

The spoliation inference instruction—a jury instruction “permitting” the jury to infer that nonproduced evidence would have been unfavorable to the party that had control over the missing evidence—at first appears to be a form of corrective remedy. But the effectiveness of this form of instruction is seriously open to question. First, the instruction does not prescribe a mandatory inference; it is not even a presumption, which would shift the burden of production. It is merely a suggestion to jury members, without any follow-up from the court, that they may, if they like, draw a particular inference. And this is an inference they may already be drawing, especially given that the spoliation victim is usually free to admit evidence of the spoliation and argue on its own accord for the inference.<sup>358</sup> Secondly, even if the jury takes important cues from the judge's instruction, the judge will issue the instruction only if there is sufficient indication that the missing evidence was indeed unfavorable to the spoliator. Evidence

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356. See *supra* note 114 and accompanying text.

357. See *supra* Part II.B.3.

358. See *supra* note 297.



used to establish the content of the missing evidence will often itself be admissible directly to prove the underlying propositions for which the spoliated evidence would have been offered. Therefore, in many cases the judge will be issuing the spoliation instruction precisely when the inference encouraged by that instruction is unnecessary given available evidence on the same point. In this case, the only new information conveyed to the jury will be the judge's displeasure with the spoliator. To the extent that the instruction has any effect, therefore, the effect seems more punitive than accuracy-inducing, as other commentators have remarked.<sup>359</sup>

#### *D. Summary*

The truth-seeking approach to trial puts great weight on both deterring tampering and correcting its effects. The primary activity approach is more concerned with lowering the litigation payoffs of those who still find tampering worthwhile, and thereby raising the private cost of socially disfavored primary activity choices. This different locus of concern manifests in different prescriptions for anti-tampering policy.

Importantly for our evolving sense of trial's purpose, the prescriptions of the primary activity approach seem more in line with current law. The primary activity approach is more consistent with the middling attitude toward anti-tampering enforcement that seems to characterize the existing regime. Moreover, the primary activity approach is also better aligned with current law's reliance on high sanctions rather than frequent detection, as well as its reluctance to go back and correct litigation outcomes skewed by tampering.

### IV. IS THE LAW MYOPIC?

According to the conventional assessment of the rules regulating evidence tampering—an assessment informed by the view that trial is primarily a truth-seeking enterprise—the law in this area is myopic. Its almost exclusive focus on tampering that occurs while litigation is pending or imminent merely encourages tamperers to shift their

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359. See, e.g., Maguire & Vincent, *supra* note 120, at 258 (finding that in granting a spoliation inference instruction, “courts sometimes adulterate their logic with punitive enthusiasm”).

operations upstream, away from the time of filing, and beyond the law's limited reach.<sup>360</sup>

This Part of the Article suggests that what is myopic is not the law's approach to evidence tampering, but rather the analytical approach to such law that focuses solely on the direct control of tampering activities. More broadly defined, "the law" does not, in fact, focus solely on downstream tampering. Instead, the law simply employs a set of devices for the control of upstream tampering that does not include the array of criminal, procedural, and evidentiary sanctions examined in Part II.

Section A explicates those upstream devices. In the process, it provides two explanations for why anti-tampering law has always seemed shortsighted under the conventional view. In the first place, the devices used to control upstream tampering are so much a part of the accepted fabric of evidence law as to be virtually invisible. As with an optical puzzle, one must purposefully adjust one's point of focus to bring these features to the fore. Secondly, such features do not regulate upstream tampering in a way that makes sense under the dominant truth-seeking approach to trial. Their role becomes clear only when one regards evidence production as a component of the law's overall project of regulating primary activity behavior.

Sections B and C argue that these upstream devices are crucial to understanding the truncated reach of direct regulations. Section B critiques the leading alternative justification for the downstream focus of direct regulation. Section C argues that direct regulations are merely picking up where the subtler devices examined earlier in this Part leave off.

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360. See *supra* note 119. Note that the substitution into upstream activity produced by the law's downstream focus can also come in the form of preventing the creation of documents in the first place. See GORELICK ET AL., *supra* note 12, § 1.15, at 19 ("[A] strict [document destruction] regime could generate a . . . chilling of the production of useful documentary evidence."). But see KATZ, *supra* note 13, at 52–59 (suggesting that the law may not be to blame for a "forbidden result" no longer being forbidden); Leo Katz, *Subornation of Perjury: A Definition*, WALL ST. J., Mar. 16, 1988, at A23 (arguing that the requirement that there be a pending investigation does not create a loophole in the law).

Yet, another form of substitution is upstream document creation. See Beckstrom, *supra* note 12, at 716 n.100 ("[A]ntitrust counselors, while urging early destruction of records in general, are agreed that one of the tenets of a good 'antitrust compliance program' is the thorough documentation of *exculpatory information* whenever companies take action in an area that is 'antitrust sensitive.'" (emphasis added)).

### A. *The Ex Ante Inscrutability of Fact-Finding*

Why is evidence law so permissive regarding how parties choose to prove their claims or defenses?<sup>361</sup> Such a rule seems to ignore an important externality: the proponent of evidence does not pay the full cost of its consideration by the fact finder.<sup>362</sup> Perhaps the law should be more discriminating in this regard, admitting only evidence whose consideration is socially, as opposed to just privately, worthwhile.<sup>363</sup> Perhaps it should do more to insure that only the “best evidence” is considered.<sup>364</sup>

Some insight into this fundamental puzzle of evidence law is provided by viewing the ad hoc nature of fact-finding as one part of a kind of “decoy” strategy. Roughly stated, the clearer the parties’ sense of precisely which of the evidentiary emissions of their primary activity choice will be decisive in future litigation, the more effectively they can target their destruction and fabrication efforts. And the

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361. Alex Stein, *The Refoundation of Evidence Law*, 9 CAN. J.L. & JURISPRUDENCE 279, 279 (1996) (identifying the “core principle (albeit with exceptions) of legally unregulated fact-finding,” also termed “the doctrine of ‘free proof.’”). See, e.g., FED. R. EVID. 401 (defining “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”); FED. R. EVID. 402 (“All relevant evidence is admissible, except as otherwise provided by the Constitution . . . Act of Congress, [or] by these rules . . .”); see also *Old Chief v. United States*, 519 U.S. 172, 186–87 (1997) (“[T]he Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice . . . . This is unquestionably true as a general matter.”).

362. Federal Rule of Evidence 403, whose central purpose is to guard against “unfair prejudice,” also permits the exclusion of relevant evidence “if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Yet, Rule 403 is hardly used as a device for internalizing evidence costs. Nor are many of the other rules by which certain forms of evidence are inadmissible. On this particular externality, see the discussion in Sanchirico, *Character*, *supra* note 14, at 1250–52 and sources cited therein.

Regarding the full set of externalities at issue here, see e.g., Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 333–34 (1982) (arguing that in deciding whether to file, plaintiff ignores both (1) the defendant’s litigation expenses, and (2) the primary activity incentives created by litigation, and proposing that the combination of these effects can result in a surplus or deficit of lawsuits).

363. Stein, *supra* note 361, at 279 (criticizing from a truth-finding perspective the “core principle (albeit with exceptions) of legally unregulated fact-finding” and “oppo[sing] the doctrine of ‘free proof’”).

364. Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 227 (1988):

[M]y thesis is that there exists, even today, a principle of evidence law that a party should present to the tribunal the best evidence reasonably available on a litigated factual issue. This principle is not absolute . . . . Nevertheless, it is a general principle that manifests itself in a wide variety of concrete rules governing the trial process.

more effectively parties can tamper with evidence, the lower the litigation risk from taking the bad primary activity action. These benefits of inscrutability weigh against the obvious drawbacks of a system that is not as choosy as it might be about the evidence it entertains.<sup>365</sup>

1. *Thought Experiment: Broadening the Range of Potentially Unfavorable Evidence.* To explore more fully the impact of fact-finding inscrutability on evidence tampering and litigation objectives, imagine the following thought experiment. First, suppose that we have identified the full set of “evidentiary emissions” that are more likely to be generated following the defendant’s “bad” primary activity behavior than following her “good.” Second, imagine a system—more restrictive than our own, with its lenient relevancy requirement—that admits as proof of defendant’s bad behavior only those evidentiary emissions for which the probability of generation following bad behavior exceeds by some threshold the probability of generation following good.<sup>366</sup> If the difference in probabilities does not meet this threshold, a more stringent manifestation of Federal Rule of Evidence 403<sup>367</sup> prohibits admission: the evidence is judged to be insufficiently probative of bad behavior to justify the public expense of hearing it.<sup>368</sup>

Third, starting from this system, imagine broadening the range of evidence that counts toward liability—thus moving toward our actual system. As shown within, this broadening will magnify the defendant’s incentive to choose the good primary activity action. At the same time, it will have an ambiguous effect on the court’s ability to find truth.

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365. Stein, *supra* note 361, at 279. The ad hoc nature of fact-finding exacerbates other sources of organic uncertainty that are already present. For instance, a manufacturer will face uncertainty regarding not just what evidence plaintiffs will use against it in court, but also which of its customers end up as plaintiffs, and which of its products lead to accidents.

366. Alternatively, and to the same effect in the following discussion, we could imagine establishing a threshold for the ratio, rather than the difference, of these conditional probabilities. This ratio corresponds to the likelihood ratio in the odds formulation of Bayes’ Rule.

367. See FED. R. EVID. 403 (granting trial judge discretion to rule relevant evidence inadmissible when “its probative value is substantially outweighed by the danger of unfair prejudice [and] waste of time”).

368. Federal Rule of Evidence 403 is rarely invoked for this kind of “efficiency” purpose. More commonly, it is employed to avoid undue prejudice.

2. *Effect on Primary Activity Incentives.* When relatively few pieces of evidence are admissible, the defendant can focus her evidence destruction efforts. Conversely, the more forms of evidence that are admissible, the more the defendant has to spend destroying evidence in order to avoid liability—or, put another way, the less effective at avoiding liability is any given level of effort devoted to evidence destruction. Thus, broadening the set of evidence that may count toward the plaintiff's burden of persuasion raises the defendant's cost of avoiding liability via tampering. This thereby decreases the defendant's litigation payoffs in states of the world where the set of natural evidentiary emissions would be sufficient for liability. These states being more likely following "bad" primary activity behavior, the end result is an increase in the defendant's incentive to eschew such bad behavior.

To take a schematic, but illustrative, example, suppose that following the defendant's choice in the primary activity, any number of twenty different "pieces" (i.e., forms) of damaging evidence are emitted into his possession. The emission of each of these pieces of evidence is more likely following the defendant's choice of the bad primary activity action than following his choice of the "good." But some of these pieces of evidence are more socially preferable than others. Their probability difference may be greater, or their probability levels lower, or they may just be less expensive to present and hear. The precise reason for the social preference is not important here.

Evidence system 1 chooses the very "best" piece of evidence from the twenty and insists that imposition of liability rests solely on the plaintiff's presentation thereof. A defendant who wants to avoid liability can, of course, always choose the good primary activity action. But in this first system, he also has the relatively viable alternative of taking the bad action—which he finds less costly in the primary activity—and focusing his efforts instead on preventing or destroying this best piece of evidence, whenever it is emitted.

Compare this with evidence system 2. This system chooses the "top ten" pieces of evidence from the full set of twenty and stipulates that only these are admissible. It then requires that the plaintiff present at least five of these to meet her burden of persuasion.<sup>369</sup>

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369. The text stipulates that five, rather than one, out of the top ten must be presented to suggest the fact that by adjusting the number of pieces of evidence required from the admissible set, evidence system 2 may be made roughly comparable in terms of its true and false positives

Destroying or preventing evidence is now a less attractive means of avoiding liability. Formerly, the defendant could focus his destruction efforts on the single best piece of evidence. Now to avoid liability entirely the defendant must destroy the excess, if any, of the number of emitted pieces of evidence over four. For example, if five pieces are actually emitted, the defendant avoids liability by destroying one. If seven are emitted, the defendant avoids liability by destroying three. And if all ten pieces are emitted, the defendant avoids liability by destroying six.

Choosing the good primary activity is a more attractive means for the defendant of avoiding liability in system 2 than in system 1. In system 1, taking the good primary activity action competed with the relatively easy alternative of taking the bad action and (more often) precluding or destroying a single pre-specified piece of evidence. In system 2, the alternative to the good primary activity action is not as attractive. To guarantee exoneration, for example, the defendant would have to prevent or destroy the emission of up to six pieces of evidence. Alternatively, monitoring only one piece of evidence—as was completely effective in system 1—only somewhat reduces, and does not eliminate, the possibility of being held liable in system 2.

In evidence system 3, each of the twenty pieces of evidence is ruled admissible and the burden of proof may be met by the presentation of any ten. Relative to system 2, avoiding liability by evidence tampering is now even more expensive. Avoiding liability requires destroying the excess, if any, of the number of emitted pieces of evidence over nine. Thus the required amount of destruction now ranges from one to eleven, rather than from one to six. Turning these evidentiary emissions off at the source—by taking the good primary activity action—now seems all the more attractive.

The mechanism at work here is reminiscent of strategies employed in other areas. We may imagine that when the queen of a particularly troubled country traveled about, the coach that transported her was randomly and secretly selected from her fleet and then sent out as one in a sequence of departures along with other empty coaches acting as decoys. On the one hand, this procedure meant that the queen did not always travel in the fastest and most comfortable carriage. On the other hand, it helped to confound her would-be assassins. In particular, it raised the cost of producing any

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to evidence system 1. Note in this regard that the existence of *any* one of the top ten would be far more likely than the existence of a *particular* one of the top ten.

given likelihood that she came to harm. An assassin had to attack all coaches to guarantee his objective. Correspondingly, attacking only one coach had less of an impact on the probability that the queen would actually come to harm. One hopeful possibility, and likely the intention of the queen's guard, was that assassins would find attacking any number of coaches not worth their while.

Similarly, as we broaden the range of admissible evidence we begin to give weight to evidence that, considered in isolation, seems of questionable merit—evidence with a scintilla of probative value, for instance. Yet admitting this evidence makes evidence destruction a less effective method of avoiding liability, and thus makes the alternative method—taking the good primary activity action—relatively more attractive.

3. *Effect on Truth-Finding.* Any policy choice that lowers litigation payoffs in evidentiary contingencies that are more likely following the bad primary activity action increases the incentive to choose the good primary activity action. The decoy effect discussed above does precisely this, and so its connection to the primary activity approach is clear.

In contrast, the connection to truth-finding is decidedly murky. Consider again the thought experiment wherein the range of potentially unfavorable evidence was extended. For the truth-finding approach, this adjustment sets in motion several contradictory forces.

First, the chance that any given bad primary activity actor will avoid liability goes down. This is because fewer bad primary activity actors find it worthwhile to destroy the now larger amount of evidence that must be eliminated to avoid liability. Naturally, this reduction in the rate of false exonerations improves truth-finding.

Second, the chance that any given good primary activity actor will be held liable goes up. This is for two reasons. First, even good actors sometimes face bad evidence. In a system with narrower admissibility, these good actors might have found it worthwhile to destroy their way out of liability. Now they may prefer to just pay the damages. Secondly, the evidence added to expand the set of admissible evidence may not be as precise a signal of the bad act. Some good actors will be held liable based solely on the additional noise. Overall, the greater rate of false liability is bad for truth-finding.

These first two effects pull in opposite directions. Nonetheless, were they the only considerations, one could perhaps argue that the

news was good for truth-finding on net. Given that a larger proportion of bad actors than good are tampering in the first place, it is plausible that a larger proportion of bad actors are converted away from tampering. This suggests that the decrease in the rate of false exoneration is greater than the increase in the rate of false liability.

However, these are not the only considerations.<sup>370</sup> Two others are worth highlighting. First, even if the rate of false exoneration falls by more than the rate of false liability rises, the absolute number of wrongly decided cases may still increase if there are fewer bad actors than good.<sup>371</sup> The fewer bad actors there are to falsely exonerate, the lower the impact of a given decrease in the rate of false exoneration. Similarly, the more good actors there are to falsely hold liable, the greater the impact of a given increase in the rate of false liability.

Secondly, the policy change under consideration influences not just what happens at trial, but also what happens in the primary activity. In particular, as explained in Section 2, expanding the set of admissible evidence increases the incentive to eschew the bad primary activity act. As such, the number of bad primary activity actors will decrease and the number of good will increase. This has two central implications. In the first place, it adds to the ambiguity of the population composition effects described in the previous paragraph. These are not just uncertain, but also in flux. Second, it adds its own independent source of ambiguity. The change in primary activity behavior has a direct impact on the number of wrongly decided cases. The direction of the effect depends on whether the initial rate of false exoneration is greater or less than the initial rate of false liability. If the rate of false exoneration is greater, the population shift toward good actors will decrease the number of

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370. The discussion in the following two paragraphs is guided by the following mathematics. Let  $b$  be the proportion of bad actors in the population. Let  $fe$  be the rate of false exoneration and  $fl$ , the rate of false liability. Then the number of wrongly decided “cases” (see *infra* note 371) is  $bfe + (1-b)fl$ . The total derivative of this expression is  $bdfe + (1-b)dfl + db(fe-fl)$ . The current paragraph considers the first two addends. The next paragraph considers the second derivative of these addends with respect to  $b$ , and the third addend.

371. Adding to the murkiness here is the fact that truth-finding is not a self-defining policy objective. In the first place, how false exoneration and false liability are combined into a single evaluative dimension must be additionally specified. The implicit assumption in this analysis is that the actual incidence of each kind of error is important in this combination. Second, one must also additionally specify how to treat cases that do not reach trial, perhaps because they are not even filed. “Cases” is used in the text in an expansive sense to mean “underlying events or conditions,” including those that do not result in filed suits. A unfiled “case,” therefore, is counted the same as a finding of no liability. Quite reasonably, then, when a bad actor is not even sued, this is counted as an inaccuracy.



wrongly decided cases. If the rate of false liability is greater, the number of wrongly decided cases will increase. To see this, imagine converting a single actor from bad to good. Will the chance that her case is wrongly decided increase or decrease? Clearly, it will increase if mistakes are more often made for good actors than for bad.

*B. The Questionable Private-Costs Reason to Push the Tamperer Upstream*

Before connecting the foregoing analysis to the downstream focus of anti-tampering enforcement, let us assess the most common alternative explanation for this apparently myopic outlook.<sup>372</sup>

This explanation posits that effectively blocking (i.e., preventing or destroying) a given evidentiary emission of the bad primary activity action is in effect less expensive for the potential litigant the closer the blocking is to the time of litigation. According to this view, evidentiary emissions are not just the byproducts of primary activity behavior, they also often facilitate that behavior. A document on pricing policy is not just the byproduct of anti-competitive behavior, but also facilitates the planning and implementation of business strategies, some of which may be regarded as anti-competitive under the law, and some as pro-competitive. The imperfections of the human mind and its imperfect ability to communicate make recordation a valuable business tool.<sup>373</sup> A business that prevents the creation of such a pricing document, or that re-collects and destroys all copies of such documents immediately after the pricing meeting, does not enjoy these benefits to as great an extent. On the other hand, a business that keeps the pricing document on file up until litigation, at which time it shreds the document or simply fails to produce the document on request, has the benefit of that recordation in devising, communicating, and implementing its business plan.<sup>374</sup>

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372. This Article focuses on the contest between two consequentialist conceptions of trial. But there may also be deontological arguments for the law's apparently myopic focus on upstream tampering. See, e.g., KATZ, *supra* note 13, at 52–59 (arguing for the moral significance of certain formal distinctions, an approach that might be applied to justifying document “retention” policies that are sufficiently nonselective); see also Katz, *supra* note 119 (suggesting that there is an important moral distinction between upstream and downstream obstruction).

373. This idea is explored in depth in Chris W. Sanchirico, *Evidence, Procedure, and the Upside of Cognitive Error*, 57 STAN L. REV. (forthcoming Nov. 2004) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=497882](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=497882)).

374. See Beckstrom, *supra* note 12, at 717:

[T]he proposed statute would not completely frustrate those who would purposefully violate the substantive laws. Refuge could often be found in the simple expedient of

Because downstream blocking of a given evidentiary emission is effectively less expensive than upstream blocking, the argument continues, downstream blocking is a greater problem for legal process. Directing enforcement resources at preventing downstream tampering thus makes sense. To the extent that the literature on evidence tampering has at all considered primary activity incentive effects, this is the extent of the discussion.<sup>375</sup>

Although the opportunity cost of making use of one's evidentiary emissions in the time before litigation is certainly a cost of early destruction, it is not the only cost. And while opportunity costs may be lower for downstream destruction, other kinds of tampering costs are likely to be greater.

What is important to the tampering litigant, of course, is not destroying a particular piece of paper, but rather preventing the evidentiary emission represented by that piece of paper from getting into court. It profits the spoliator little to have shredded every copy of the damaging document except the one that gets admitted into evidence. Practice journals warn that damaging documents have a way of multiplying with cancerous rapidity.<sup>376</sup> The fact that copies can themselves be copied leads to the possibility of exponential growth. And the farther down the family tree ones goes, the less information and control there is over where the documents are. Practice guides specifically warn that copies of documents may end up in employees' personal files.<sup>377</sup> It may be difficult for the center to find out about

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not making records. At least this route would be inconvenient for them because it is usually better business practice (aside from antitrust considerations) to make a record of anything so important to a business that it is willing knowingly to violate the antitrust laws to accomplish it.

375. See GORELICK ET AL., *supra* note 12, § 1.15, at 19 (citing Beckstrom, *supra* note 12, at 717). In fact, this precise point is only weakly made by Beckstrom. It appears in much stronger form in Hart, *supra* note 348, at 1676: "[A]n attorney [may feel] that the only way to keep certain evidence out of court is to destroy it altogether, or, in the case of documents, to recommend that they never be created."

376. See, e.g., GORELICK ET AL., *supra* note 12, § 9.4, at 365–66:

[D]uring the investigations of Ivan Boesky, Michael Milken, and Drexel Burnham Lambert, two of the keys to the prosecution where (1) the fact that, unbeknownst to Mr. Boesky, his secretary had made copies of ledgers (the originals of which Mr. Boesky ordered destroyed) that reflected a secret agreement between Mr. Boesky and Mr. Milken, and (2) the ability of Mr. Boesky's former . . . bookkeeper . . . to reconstruct the transactions from slips of paper that even those who produced them to the government could not understand.

377. See, e.g., GORELICK ET AL., *supra* note 12, § 9.9, at 304 ("The 'pack-rate' [sic] phenomenon, which refers to employees who create and maintain their own personal files of documents which were to have been destroyed, drastically undermines the benefits of [document retention/destruction programs].").

these copies and even more difficult to prevent their comprehensive destruction when employees are capable of imagining that their personal interests are not always aligned with those of their current employer.<sup>378</sup>

The use of computers and electronic documents exacerbates the problem. No need to travel to Kinko's, no need to stuff envelopes. A few clicks and what was one pattern of electrons on one magnetized disk is nearly instantly one hundred replicas in one hundred far-flung locations, a process that is easily repeated from each of these one hundred locations.

Therefore, while the opportunity cost of early destruction may be greater than for later destruction, the actual costs of *effective* destruction are likely lower.<sup>379</sup> One surefire method of preventing a document from showing up on a potential plaintiff's computer screen is not to create the document in the first place. One way to be sure that the meeting agenda does not end up in the wrong hands is to completely delete it right after it is printed, and then collect and destroy all of the printed copies right after the meeting.

Another reason why downstream destruction is not necessarily less costly has to do with how the destruction itself would be proved. Throughout we have been discussing the evidentiary emissions of the primary activity action. Similarly, sanctions are imposed on document destruction on the basis of the evidentiary emissions of destructive activity. Evidentiary emissions, like environmental emissions, often dissipate and degrade over time. Witnesses' recollections become clouded. Documents do disappear. Trash is eventually burned. Important aspects of legal process—such as statutes of limitations—are designed with evidentiary half-lives in mind. Consequently, downstream destruction is a riskier activity because the destruction is still fresh at the time of litigation.

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378. See, e.g., *id.* § 17.4, at 373 (“Clients . . . must be made aware that their employees . . . will not be willing to go to prison for them.”).

379. See, e.g., *id.* § 9.4, at 300 (“As was illustrated perfectly in Oliver North’s destruction and alteration of Iran-Contra memos, rarely will a document-destruction effort find all copies, computer records, or memories of the documents. In those circumstances, the document remains as evidence, accompanied by the strong negative inference arising from the attempted destruction.”).

C. *The Private Benefits Reason to Focus Direct Regulation Downstream*

For the foregoing reasons it is difficult to argue that the downstream destruction or fabrication of a particular evidentiary emission is somehow more cost-effective for the litigant than the same activity upstream. It is difficult, therefore, to explain the law's preference for upstream tampering in terms of private costs.

A better explanation may reside in the differential private benefits of upstream versus downstream fabrication and destruction. This Part of the Article began with the argument that the inscrutable nature of the fact-finding process was a device for raising the cost of using evidence tampering to affect litigation outcomes. It seems clear that the effect of this characteristic of fact-finding on evidence tampering would differ systematically across upstream and downstream tampering activity. The upstream tamperer has much less of an idea of what evidentiary emissions will be decisive in future litigation. The nature of future litigation itself—let alone the evidence that will be decisive for that judge or jury—is all guesswork for the upstream tamperer.<sup>380</sup> For the downstream tamperer, on the other hand, many, though not all, of the uncertainties have already been resolved. More generally, the further downstream the tamperer's vantage point, the more she knows about what evidence is likely to make a difference to litigation outcomes.

Because the decoy logic described in Section A is systematically less effective the farther one travels downstream along the litigation flow, it stands to reason that some other line of defense is necessary for downstream tampering. The direct regulation of evidentiary foul play—including the criminal, procedural, and evidentiary sanctions examined in Part II—fills that role.

This argument helps to explain several specific and puzzling aspects of existing doctrine. First, it sheds some light on the law's tendency to ignore evidence tampering that predates the complaint.<sup>381</sup> Given all the possible lawsuits that might be filed, service of the complaint with its short plain statement of the plaintiff's claims often represents a discrete jump in the information available to parties about precisely what evidentiary emissions are likely to be decisive.

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380. See Beckstrom, *supra* note 12, at 713 (“[I]t is easier to keep everything than spend time and effort deciding what to keep and what to throw away.”); *id.* at 716 (“[O]ld documents may serve to explain, as innocent, conduct that at first glance may be suspicious.”).

381. See generally *supra* Part II.

Second, the argument helps to explain the law's focus on whether the tamperer was "on notice" of the litigation in those few circumstances where the law has been willing to sanction pre-filing tampering. After the  $n^{\text{th}}$  small airplane crashes, the  $n^{\text{th}}$  rifle fires on safety release, or the  $n^{\text{th}}$  train hits the car at the crossing, the plaintiff's formal statement of her complaint is nearly superfluous: the defendant already knows quite a bit about what evidence will likely be important in the evidentiary battle to ensue.

Third, the argument provides additional insight into why the system is most consistent and energetic about sanctioning the tamperer when it violates an order to produce or preserve.<sup>382</sup> No doubt some of the reason for this resides in the party's bold disobedience of a specific judicial dictate. But a more complete explanation might also note that a litigant's efforts to secure a court order for the preservation or production of particular evidence are a very strong indication that this evidence is important to the litigant's case. To obtain a preservation order is to tip one's hand. The order and the effort expended to obtain it provide reliable information to the other side—in the form of a costly signal with differential benefits—about the importance of such evidence to the movant's case. Thus, the order should lead the opposing side rationally to increase its assessment of the probability that this evidence will be decisive in the court's imposition of liability or awards. Accordingly, it increases the opponent's perception of the private benefits of destroying or altering this evidence. Effective sanctions summarily imposed become a necessary counterweight to this more powerful destructive impulse.

### CONCLUSION

Current writing on evidence tampering creates the impression that the current system of litigation is in a state of fundamental disrepair. But determining whether the system is doing what it is supposed to be doing requires a clear conception of what the system is supposed to be doing in the first place. And, as this Article has argued, the general perception that the system is broken may have more to do with defects in the conventional view of trial's purpose.

The conventional approach to legal process focuses almost exclusively on the task of resolving the particular factual dispute that

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382. See *supra* Part II.B.1.

happens to have been placed before the court. The rules of evidence, for instance, are conventionally viewed as a means of ensuring that such disputes are correctly decided. This Article suggests, in contrast, that the litigation pyramid's massive primary activity base does and should play a vital role in determining what happens at its tiny trial vertex. Most important is not the system's ability to sort out what has already come to pass in each of the ninety million transactions and occurrences that make their way into filed cases every year,<sup>383</sup> but rather the system's ability to influence what will happen in every transaction or occurrence engaged in by each of 275 million individuals every day.

To be sure, the implications of truth-finding and primary activity incentive setting often correspond. But, if an area of procedural law remains troubling in conventional discourse, there is a fair chance that this is a place where the generally accepted truth-finding approach is a poor proxy for the law's primary activity purpose. The law of evidence tampering confirms this tendency. It is an area that remains especially troubling to those who have studied it. And, as established in this Article, it is also an area where the goal of finding truth *ex post* is a poor proxy for the goal of shaping truth *ex ante*.

Under the truth-finding approach, anti-tampering enforcement has the dual purpose of deterring tampering and correcting litigation outcomes that are skewed by tampering that was undeterred. From a primary activity incentive perspective, anti-tampering enforcement is in the first instance a tax on those who find tampering worthwhile despite its legal risks. Because taking the socially disfavored primary activity action is more likely to place one in this position, anti-tampering enforcement is also a tax on the socially disfavored action.

From these differences it follows that the primary activity approach is more in line with the law's apparently lax attitude toward evidence tampering. Where the benefits of enhanced anti-tampering enforcement are self-enhancing under the truth-finding approach, they are self-dampening under the primary activity approach. Consequently, where reconciling the law's leniency toward evidence

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383. See EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 10 (Brian J. Ostrom et al. eds., 2002) (describing the number of state transactions); LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS: ANNUAL REPORT OF THE DIRECTOR (2001), available at <http://www.uscourts.gov/library/dirrpt01/2001.pdf> (describing the number of federal transactions).

tampering with truth-finding requires substantial conceptual contortion, reconciling it with primary activity incentive setting merely requires hypothesizing that the self-dampening effect characterizing that approach is sufficiently prominent. Similarly, the law's preference for high sanctions rather than likely detection as a means of discouraging tampering makes less sense if a major purpose of enforcement is to rectify litigation outcomes that are skewed by tampering, as implied by a truth-finding approach. Nor is it easy to justify the law's reluctance to correct litigation outcomes when tampering is discovered after judgment is entered. Such difficulties are largely avoided, however, when anti-tampering enforcement is viewed as but one integrated component in the overall mechanism by which law affects everyday behavior.

The view that trial is primarily a truth-finding exercise also leads one away from the most natural justification for the law's apparently myopic insistence on punishing only downstream tampering. The inscrutable, ad hoc nature of fact-finding, which seems like a bad idea from a truth-finding perspective, makes sense from a primary activity perspective. The difficulty of targeting one's tampering activity raises the cost of avoiding litigation exposure for "bad" primary activity behavior. That unpredictability is greatest in the upper reaches of the litigation flow. And this helps to explain why the devices that directly sanction evidence tampering are so focused on downstream activity.

## APPENDIX

This Appendix supplements the analysis in Part III. Section A contains an intuitive discussion of several issues not covered in the main text. Section B subjects the analysis in Part III to mathematical modeling in order to test its internal consistency and make explicit its underlying assumptions.

*A. Supplemental Discussion*

1. *The Trajectory of Social Costs.* As noted in the Introduction, the social costs of anti-tampering enforcement are roughly the same across truth-finding and primary activity approaches.<sup>384</sup> Nonetheless, the trajectory of social costs is a potentially important ingredient in distinguishing the implications of these rival approaches.

Part III.B discussed how the differing trajectories of social benefits across truth-finding and primary activity approaches had different implications for the optimal enforcement level. That discussion implicitly assumed that incremental social costs were relatively constant. How would the analysis in Part III.B change, if we included explicit consideration of the trajectory of social costs?

*a. Condition on Cost and Benefit Trajectories.* We start with the principle that social costs must be accelerating relative to social benefits as we increase the level of enforcement toward the socially optimum level. (This principle is sometimes referred to as the “second-order necessary condition” for an optimum.) The reasoning here has three steps. First, when we are precisely at a socially optimal level of anti-tampering enforcement—the level that balances costs and benefits to produce the largest net social benefit—the social benefits from further increasing anti-tampering enforcement must be no more than the social costs. Otherwise, capturing these additional social benefits would, impossibly, improve upon what was supposed to be the best that we could do.

Second, and by similar reasoning, starting from a level of enforcement just below the socially optimal level, the social benefits from increasing anti-tampering enforcement up to the socially

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384. They are only “roughly” the same because the differing implications for enforcement methods, as discussed in Part III.C, *supra*, may produce different social cost trajectories.



optimal level must be greater than the additional costs. Otherwise, the lower level would, again, be better than the best.

Combining these first two steps, we see that marginal social benefits must be less than marginal social costs at enforcement levels just below the optimum, but greater at the optimum. In other words, the social benefits from anti-tampering enforcement must be increasing at a faster rate than the social costs at enforcement levels just below the optimum, but at a slower rate than social costs at the optimum.

This in turn has implications, in the third and final step, for the relative acceleration of social costs. If someone says that the red car was moving at a slower speed than the blue car at 11:50 A.M. and a faster speed at noon, it must be that the red car was accelerating relative to the blue car at some point between these two times. Similarly if the social benefits of anti-tampering enforcement are increasing at a faster rate than the social costs below the social optimum (i.e., at 11:50 A.M.) and a slower rate than social costs at the optimum (i.e., at noon), then social costs must be accelerating relative to social benefits as we approach the social optimum from below.

*b. Implications for Truth-Finding.* If we take truth-finding to be the object of trial, it is difficult to justify the middling level of anti-tampering enforcement that we seem to see in the current system. We have seen that the social costs of anti-tampering enforcement must be accelerating relative to the social benefits as we approach the social optimum from below. It is unlikely that this will happen at any middling range of anti-tampering enforcement. At a middling level of enforcement we can expect a steady (or even increasing) density of marginal tamperers. When this is the case, the social benefits of anti-tampering enforcement grow roughly exponentially,<sup>385</sup> which is to say that marginal social benefits increase in proportion to the level of anti-tampering enforcement—which is, in turn, to say that the social benefits accelerate.

In contrast, it is implausible that social costs of anti-tampering enforcement accelerate in their middling range, let alone that their acceleration exceeds that of the truth benefits of enforcement. In the first place, at middling levels of enforcement, economies of scale in anti-tampering enforcement are unlikely to have so exhausted themselves as to reverse into diseconomies of scale that are, in turn,

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385. See *supra* note 350.

so constricting as to cause the social costs of anti-tampering enforcement to increase at an increasing rate.

Secondly, the decrease in the number of inframarginal tamperers as we increase enforcement<sup>386</sup> acts as a decelerating force for social costs. The cost of anti-tampering enforcement is tied in part to the number of inframarginal tamperers. The greater the number of inframarginal tamperers, the more often courts must hold evidence tampering hearings, the more frequently litigants must defend themselves at such hearings, the greater the number of litigants who spend time and effort practicing and preparing their tampering activities to avoid getting caught. Therefore, if we raise the private cost of tampering by beefing up anti-tampering enforcement, this increases social costs in part because the tampering that is still being perpetrated is more socially expensive. But, the greater the level of anti-tampering enforcement, the fewer the number of inframarginal tamperers, and so, for this effect, the lower the incremental cost of increasing anti-tampering enforcement.

Therefore, the improbability of significantly decreasing returns to scale at low and middling levels of enforcement combined with the marginal cost-reducing effects of a shrinking infra-margin make it unlikely that social costs accelerate faster than truth-oriented social benefits. This in turn makes it unlikely that a truth-oriented system would ever purposefully settle on even a middling level of anti-tampering enforcement. Thus, even allowing for a more general configuration of social costs, there is still great difficulty in reconciling the current shape of our anti-tampering enforcement efforts with the rhetoric that trial is predominantly a truth-finding exercise.

*c. Implications for Primary Activity Incentive Setting.* On the other hand, there is no inconsistency in explaining a middling level of anti-tampering enforcement taking primary activity incentive setting as the object of trial. We have seen that the social costs of anti-tampering enforcement must be accelerating relative to the social benefits as we approach the social optimum from below. It was further demonstrated that the social benefits of anti-tampering enforcement measured in terms of the effect on the primary activity incentives of the tamperer, rather than in terms of truth-finding, have a self-dampening character. In other words, these important social benefits of anti-tampering enforcement increase at a decreasing

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386. See *supra* Part III.B.1.

rate—which is to say that they decelerate as we approach the social optimum. Therefore, the social optimum may lie anywhere that the economies of scale in anti-tampering enforcement are not so great. In particular, at any middling level of enforcement, the social costs of anti-tampering enforcement are not likely to be decelerating faster than the social benefits. Importantly, the social optimum may well be at a point where economies of scale in anti-tampering enforcement are not exhausted, as long as the increase in social costs slows less rapidly than the increase in social benefits.

2. *The Role of Inframarginal NonTamperers.* This Section considers the effect of increased anti-tampering enforcement on the inframarginal nontamperer, the third type in the taxonomy from Part III.A.2, and a type that was explicitly left out of the analysis of incremental increases in enforcement in Parts III.A.3 and III.A.4. The conclusion is this: Those who were already choosing not to destroy evidence prior to the increase in enforcement are only secondarily affected by increasing the level of anti-tampering enforcement from its current level. Further, what effect there is on these actors remains ambiguous and is unlikely to be decisive in shaping the overall effect.

In a world with no “false positives” in anti-tampering enforcement—i.e., a world in which those who do not destroy evidence are not falsely positively identified as spoliators—increasing enforcement levels has exactly no effect on the inframarginal nontamperer. First, the inframarginal nontamperer has already decided that tampering does not pay and so does not change its behavior in response to increased enforcement. Second, the inframarginal nontamperer is never mistakenly punished. Thus, whatever is done to beef up anti-tampering enforcement is, from its perspective, superfluous.

In a world with false positives in anti-tampering enforcement, the effect on the inframarginal nontamperer of increased enforcement effort is precisely as ambiguous as the effect of increased enforcement on the incidence of false positives. Some methods of enhancing anti-tampering enforcement may have as a byproduct an increase in the number or severity of erroneously imposed spoliation sanctions. This in turn will lower litigation payoffs for the nonspoliator, who now faces a heightened risk of becoming one of the system’s false positives. On the other hand, additional resources devoted to anti-tampering enforcement may actually decrease the number of false indictments and convictions as investigations and satellite trials are

more thoroughly conducted. This would raise the litigation payoffs for the inframarginal nontamperer.

It is thus impossible to deduce how inframarginal evidence destroyers will be affected by increased enforcement. However, it is perhaps possible to infer that the crosscurrent of countervailing effects on these still honest actors makes it likely that, whatever direction the effect points in, the net effect is unlikely to defeat the summary proposition of the foregoing analysis: the main force driving the primary activity benefits of anti-tampering enforcement is the effective taxation of those on the opposite side of the evidence tampering margin, the inframarginal tamperers.

3. *Self-Dampening Primary Activity Benefits and the Possibility that "Good" Primary Activity Actors will be Inframarginal Tamperers.* The following discussion pertains to Part III.B.1. The claim there was that decreasing the payoffs for inframarginal tamperers has less and less impact on primary activity incentives because the chance of ending up as an inframarginal tamperer declines.

However, when there is a nontrivial chance that safe product designers may also find tampering worthwhile, the primary activity benefits of additional anti-tampering enforcement need not be *monotonically* self-dampening. If anti-tampering enforcement is increased by a small amount, the probability of ending up as an inframarginal tamperer given safe product design may decrease faster than the same probability given unsafe design. For example, the probability of ending up as an inframarginal tamperer given safe design may decline by two percentage points from 5% to 3%, whereas the probability of ending up as an inframarginal tamperer given unsafe design may decline by only one percentage point from 20% to 19%. Thus, the probability difference actually increases from fifteen percentage points to sixteen. That, in turn, means that decreasing the payoffs for inframarginal tamperers has a greater impact than before.

Nevertheless, the probability difference cannot be larger than the larger of the two probabilities (i.e., the probability for unsafe design). Therefore, the primary activity benefits of additional enforcement will always exhibit self-dampening in the large, if not also in the small. If, in the above example, we continued to increase anti-tampering enforcement until the probability of ending up as an inframarginal tamperer given unsafe design was 14%, the probability difference could be no greater than 14%, implying a decrease from 15%.

In addition, for many common distributional forms, primary activity benefits will indeed be *uniformly* self-dampening over the relevant range. Imagine, for example, that the benefits of tampering given safe product design are normally distributed with mean  $m_s$  and variance one, while the benefits of tampering given unsafe product design are normally distributed with mean  $m_u > m_s$  and variance one. In this case, the probability density of tampering benefits given safe design exceeds that for unsafe design at all benefits levels greater than the average of the two means. Therefore, the relevant probability difference, as identified above, is decreasing for all levels of private tampering costs greater than this average mean. That implies that as we increase the level of enforcement, primary activity benefits become once and for all self-dampening even while more than half of those who design unsafe products still find tampering worthwhile.

4. *Focus on Marginal Changes.* The thought experiment in Part III considers a marginal increase in the expected sanction for document destruction, one small enough to deter only the “marginal tamperer,” as defined below. The effect of a larger increase will simply be the aggregation of the effects of many small increases.

5. *Tamperer’s Opponent’s Primary Activity Incentives.* In judging the primary activity incentive benefits of increased enforcement Part III focused on the impact on the tamperer’s own primary activity incentives. Another thought experiment might be conducted to examine the effect on the tamperer’s opponent’s incentives.<sup>387</sup> Differences between the truth-finding approach and the primary activity incentive approach exist in either case. But they are more pronounced in the case of the tamperer’s own incentives, and that is why it is highlighted in the text.

6. *Alternatively Manipulating the Stakes Attached to Evidence Production.* For the task of affecting the incidence and impact of evidence tampering, the law actually has two points of impact, corresponding to the costs and benefits that individuals weigh in deciding whether to engage in evidentiary foul play. Part III of the Article considers the law’s attempts to alter the individual’s perceived

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387. Some of issues in this case are considered in Sanchirico, *Games, Information, and Evidence Production*, *supra* note 14 and Sanchirico & Triantis, *Evidentiary Arbitrage*, *supra* note 14.

private cost of engaging in evidentiary foul play. Such policy reforms include beefing up the prosecution of perjury and obstruction of justice, or more liberally meting out adverse inference instructions and discovery sanctions against the spoliator. In some contexts the law can also affect the litigants' perceived private benefits from evidence tampering, by fine-tuning how verdict and remedy hang on particular forms of evidence. This is perhaps most relevant in a contractual context.<sup>388</sup>

### B. *Mathematical Analysis*

Consider the problem of choosing the level of anti-tampering enforcement to maximize social welfare.<sup>389</sup> The argument in Part III may be cast in terms of the *second-order* necessary conditions for an interior maximum.<sup>390</sup> The *first-order* necessary condition for an interior maximum is that marginal net social benefits are zero. As is well-known, this condition is not sufficient. For example, it would also be satisfied at an interior level of enforcement that *minimizes* social welfare. The *second-order* necessary condition for an interior maximum is that marginal net social benefits are decreasing in the level of anti-tampering enforcement. To say that the benefits of anti-tampering enforcement are “self-enhancing” under a truth-seeking approach is to say that marginal social benefits are everywhere *increasing*, not decreasing. Thus the second-order necessary condition for an interior maximum will be satisfied at no interior level of enforcement under the truth-seeking approach. In contrast, under a primary activity incentives approach, the second-order necessary condition for a maximum will be satisfied at all interior points. The precise optimal level of enforcement under the primary activity approach will depend on where marginal net social benefits vanish. Unlike for truth-seeking, nothing prevents that optimal level from residing in the low to middling range.

Second-order conditions fail under the truth-seeking approach because the map from anti-tampering enforcement to trial accuracy

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388. See generally Sanchirico & Triantis, *Evidentiary Arbitrage*, *supra* note 14 (analyzing how fabrication of evidence is affected by altering the map from evidence to liability).

389. For purposes of the ensuing discussion, assume that social welfare is twice continuously differentiable in enforcement levels.

390. For a discussion of these conditions see, for example, ALPHA C. CHIANG, *FUNDAMENTAL METHODS OF MATHEMATICAL ECONOMICS* 246–47 (Patricia A. Mitchell & Gail Gavert eds., 3d ed., McGraw-Hill Inc. 1984) (1967).

exhibits a core nonconvexity.<sup>391</sup> Nonconvexity in this context is the technical counterpart to the self-enhancing effect described in the main text.<sup>392</sup> Identifying this core nonconvexity is, in turn, the core of this Article's analysis of enforcement levels (Part III). This nonconvexity may be masked by ancillary convexities in other functional components of social welfare. Yet though such masking is theoretically possible, it is empirically unlikely for reasons discussed at length below.

1. *Basic Model.* The core nonconvexity in the optimal choice of anti-tampering enforcement under a truth-seeking approach is apparent in the following simple model (which is enriched in subsequent sections). The model tracks the thought experiment laid out in Part III.A.1. In order to incorporate the complications of anti-tampering enforcement—complications that are absent in conventional models of legal process—the model simplifies other aspects of the conventional model—such as filing and settlement decisions.

a. *Timeline.* In period 1, a risk-neutral manufacturer chooses whether to design its product safely or unsafely. If, and only if, the product is unsafely designed, the plaintiff files suit in period 2.<sup>393</sup> In period 3 “nature” determines for the manufacturer its benefit from

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391. Cf. David A. Starrett, *Fundamental Nonconvexities in the Theory of Externalities*, 4 J. ECON. THEORY 180, 189–93 (1972) (identifying a core nonconvexity in the production possibilities set in the presence of externalities and noting the troubling implications of this nonconvexity for general equilibrium theory).

392. The adjective “nonconvexity” as used in this context refers to the *set* of points that lie below the function. This set is said to be “convex” if the line segment between any two points in the set is entirely contained in the set. Unfortunately, this property is equivalent to another property of the function that is frequently termed “concavity.” The function is called “concave” if the line segment between any two points on its graph lies entirely below the graph. See generally RALPH TYRRELL ROCKAFELLAR, *CONVEX ANALYSIS* (Marston Morse & A.W. Tucker eds., 1970) (reviewing the properties of convex sets and concave functions).

Whichever term is used, the important implication for our purposes is that, over a range in which an increasing function is *nonconvex*, the greater the function's level, the greater its current rate of increase. To relate this property to the formal definition, note that if one draws a line segment between two points on the graph of the function over this range, the line will be above the graph and so also outside the set of points that lie below that graph. Relative to a linear increase between the two points, therefore, the function starts slower, but accelerates to such extent that it reaches the same endpoint.

393. One implication of the assumption that the injurer is only sued when actually liable (a typical assumption in models of litigation) is that the primary activity benefits of additional enforcement are self-dampening everywhere, rather than just self-dampening in general trend. See the discussion *supra* note 349.

pursuing a policy of destroying evidence of product design. This benefit comes via a reduction in the probability of being held liable at trial. We denote this benefit  $b$  and assume that it has continuously differentiable density  $f$ . The probability of being held liable is then  $p-b$ , where  $0 \leq p \leq 1$  is a fixed baseline probability of liability. In this subsection, we assume that  $b$  is uniformly distributed between 0 and  $p$ , and we denote the constant density:

$$\bar{f} = \frac{1}{p}.$$

If the manufacturer chooses to destroy evidence, it is sanctioned for that destruction with probability  $q$ . If sanctioned, it must pay a fine of  $s$ . In period 4, the manufacturer is held liable with probability  $p-b$ , and, if held liable, pays a fine of  $l$ .

*b. Evidence Destruction Decision.* The manufacturer chooses to destroy evidence if its expected litigation loss after destroying evidence (inclusive of the expected sanction from destruction) is less than its expected litigation loss if it refrains from destroying evidence:

$$\underbrace{(1-q)(p-b)l}_{\substack{\text{if not caught destroying} \\ \text{expected litigation loss if destroys}}} + \underbrace{q(p-b+s)}_{\substack{\text{if caught...}}} \leq \underbrace{pl}_{\substack{\text{...if} \\ \text{doesn't} \\ \text{destroy}}}.$$

Equivalently, the manufacturer destroys evidence if the benefit exceeds the threshold  $\hat{b}$ :

$$b \geq \frac{qs}{(1-q)l} \equiv \hat{b}. \quad (1)$$

Personifying different states of the world, we refer to  $\hat{b}$  as “the marginal tamperer.” The smallest possible marginal tamperer is  $\hat{b} = 0$ , in which case, the manufacturer always chooses (i.e., “all manufacturers choose”) to destroy evidence. The largest relevant marginal tamperer is  $\hat{b} = p$ , in which case—given that  $b$  is supported below  $p$ —the manufacturer never finds destruction worthwhile.

2. *The Truth-Seeking Approach.* An accurate outcome at trial means that the manufacturer is held liable for unsafe design. If the manufacturer does not destroy evidence, the chance of liability is  $p$ . If the manufacturer does destroy evidence and is not caught for doing so, the chance of liability is only  $p-b$ . And if the manufacturer



destroys evidence and *is* caught, the probability of liability returns to  $p$ . Therefore, the probability of liability conditional on trial, is:<sup>394</sup>

$$A(q, s) = \underbrace{\int_0^{\tilde{b}} p \bar{f} db}_{\text{manufacturers that don't destroy evidence}} + \underbrace{\int_{\tilde{b}}^p \left( \underbrace{(1-q)(p-\tilde{b})}_{\text{not caught destroying evidence}} + \underbrace{qp}_{\text{caught}} \right) \bar{f} db}_{\text{manufacturers that do destroy evidence}} . \quad (2)$$

The policy instruments of interest here are  $q$  and  $s$ , the probability of detection for document destruction and the ex post sanction for the same. This is reflected in the notation on the left-hand side of (2).

There are social costs to creating both  $q$  and  $s$ .<sup>395</sup> For the moment, assume that the marginal cost of  $s$  for any given level of  $q$  is constant—i.e., social costs take the form:

$$C(s, q) = sa(q) + c(q) + k , \quad (3)$$

where  $k$  is a constant and  $a$  and  $c$  are arbitrary functions.

In order to provide an expression for social welfare, we need an expression for the value of accuracy in this kind of case. Assume that this value is some arbitrary constant multiple of accuracy itself, and recalibrate the cost function  $C$  so that this constant multiple may be taken as 1. Social welfare is then:

$$W(q, s) = A(q, s) - C(q, s) . \quad (4)$$

In maximizing social welfare (4),  $q$  must be a probability,

$$0 \leq q \leq 1 , \quad (5)$$

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394. Throughout this Appendix, a tilde over a variable indicates that it is the variable over which integration is performed.

395. In particular, the social costs of  $s$  involve the cost of effort exerted by the parties in defending against imposition of  $s$  in ancillary process. Thus, it is not true, as is sometimes assumed, that the marginal cost of  $s$  is zero. *See generally, e.g.,* Choi & Sanchirico, *supra* note 353 (noting impact of, in effect,  $s$  on litigation effort and importance of this impact in assessing the wisdom of decoupling what plaintiffs recover from defendants pay in damages).

and  $s$  and  $q$  must place  $\hat{b}$  between 0 and its upper bound,  $p$ , implying:

$$0 \leq s \leq \frac{pl(1-q)}{q}. \quad (6)$$

Thus, the goal is to maximize (4) subject to (5) and (6). An *interior* maximum for this problem satisfies both (5) and (6) with strict inequality. Furthermore, an interior maximum satisfies the following first-order necessary conditions:

$$\frac{\partial W}{\partial q} = 0; \frac{\partial W}{\partial s} = 0 \quad (7)$$

and the following second-order necessary conditions:

$$\frac{\partial^2 W}{\partial q^2} \leq 0; \frac{\partial^2 W}{\partial s^2} \leq 0 \quad (8)$$

We will now show that at any pair  $(q^*, s^*)$  (not necessarily interior) that maximizes (4) subject to (5) and (6), the marginal tamperer is either  $\hat{b} = 0$  or  $\hat{b} = p$ . In other words, either the manufacturer always chooses to tamper, there being no deterrence at all of evidence destruction, or the manufacturer never chooses to tamper, there being effectively *complete* deterrence of evidence destruction.

The method of proof is to focus on  $s$  and to show that the second-order necessary condition with respect to  $s$  can never be satisfied at any level of  $s$  that is *strictly* between 0 and what it would take to make  $\hat{b} = p$ . That is,

$$s = \frac{pl(1-q)}{q}.$$

These two extremes in  $s$  correspond to the two extremes in  $\hat{b}$ , as just discussed.

The first derivative of  $W(q,s)$  with respect to  $s$  is:

$$\begin{aligned} \frac{\partial W}{\partial s} = & \underbrace{p}_{\substack{\text{prob} \\ \text{of} \\ \text{liab.} \\ \text{for} \\ \text{marg.} \\ \text{non-} \\ \text{tamp.}}} \underbrace{\frac{q}{(1-q)^l} \bar{f}}_{\substack{\text{"number"} \\ \text{of marginal} \\ \text{tamperers}}} \\ & - \underbrace{\left( (1-q)(p-\hat{b}) + qp \right)}_{\substack{\text{prob. of liab. for marg. tamperer}}} \underbrace{\frac{q}{(1-q)^l} \bar{f}}_{\substack{\text{"number"} \text{ of marg.} \\ \text{tamperers}}} \\ & - \alpha(q) \end{aligned} \quad (9)$$

$$= \left( (1-q) \bar{f} \left( \frac{q}{(1-q)^l} \right)^2 \right) s - \alpha(q) .$$

The interpretation of the first two addends of the first statement in (9) tracks the discussion in the main text. The expression

$$\frac{q}{(1-q)^l} \bar{f}$$

can be thought of as the number of marginal tamperers that convert from tampering to not tampering when we raise the tampering sanction  $s$  by one unit. In particular,

$$\frac{q}{(1-q)^l}$$

is the increase in the marginal tamperer  $\hat{b}$  and  $\bar{f}$  is the number of manufacturers at that level. Therefore, (9) shows that the incremental benefit of raising  $s$  is the conversion of

$$\frac{q}{(1-q)^l} \bar{f}$$

manufacturers from a lower probability of product liability, namely  $(1-q)(p-\hat{b})+qp$ , to a higher probability of product liability, namely  $p$ . Given this interpretation, the self-enhancing quality of anti-tampering enforcement under a truth-seeking approach can also be seen in (9). Converting marginal tamperers has a greater impact on accuracy, the greater the impact of the marginal tampering. Per marginal tamperer, the chance of rightful liability increases from  $(1-q)(p-\hat{b}) + qp$  to  $p$ , an

increase of  $(1-q)\hat{b}$ . The impact of the marginal tamperer's tampering should he not get caught,  $\hat{b}$ , is larger, the larger is the expected sanction  $s$  from tampering. Therefore, the larger is  $s$ , the greater is the accuracy benefit of further increasing  $s$ .

This self-enhancing effect is precisely reflected in the sign of the second-order derivative of  $W$  with respect to  $s$ , which is most easily taken from the last expression in (9):

$$\frac{\partial^2 W}{\partial s^2} = (1-q) \bar{f} \left( \frac{q}{(1-q)t} \right)^2 > 0. \quad (10)$$

Expression (10) is strictly positive for all levels of  $q$  strictly between 0 and 1 and all levels of  $s$ . This means that at any interior level of  $\hat{b}$  (wherein  $q$  must be strictly between 0 and 1), the marginal net social benefit of  $s$  is strictly increasing. This, in turn, means that the second-order condition with respect to  $s$  (as laid out in (8)) cannot be satisfied at an interior level of  $\hat{b}$ .

Expression (10) represents the core nonconvexity of truth-oriented  $W$  in the anti-tampering enforcement level. In a more complicated model, this core nonconvexity can be masked by other ancillary effects. We consider the most important of these in turn.

*a. Density Effects.* It is true that curvature in the density of marginal tamperers can mask the core nonconvexity exhibited in (10). But this statement is not terribly profound. To the extent that the slope of the density is up for grabs, so are the first and second derivatives of social welfare. In fact, for any desired magnitudes for these derivatives at any point, one can always find a distribution  $f$  to create these magnitudes. This fundamental ambiguity is endemic to theoretical models that posit abstract distributions—and thus all models that admit parametric uncertainty. To say anything at all one must make some commitments regarding distributional shape.

In the analysis above, we committed to a uniform distribution for  $b$ . This was, of course, much more than was necessary to enable the core nonconvexity there identified to have its effect. Indeed, the distributional assumptions required to *mask* that core nonconvexity are empirically implausible at a low to middling level of enforcement, such as is apparently seen in practice.

Intuitively, in order for distributional effects to overwhelm the effect of the core nonconvexity and enable a low to middling level of optimal anti-tampering enforcement, it would have to be the case that

the density of  $b$  was falling rapidly at such a level. In other words, the fact that we catch bigger and bigger fish as we drag the net farther and farther out to sea (the core nonconvexity) would have to be offset by a declining density of fish even when we are just starting out and are still relatively close to shore. A declining density may be plausible at high levels of  $b$ . But a declining density is more difficult to reconcile with the claim that enforcement levels are low to middling and that tampering is rampant.

In formal terms, with a more general density  $f$  of  $b$  we have:

$$A(q, s) = \int_0^{\hat{b}} pf(\tilde{b})d\tilde{b} + \int_{\hat{b}}^p \left( (1-q)(p-\tilde{b}) + qp \right) f(\tilde{b})d\tilde{b}, \quad (11)$$

$$\begin{aligned} \frac{\partial W}{\partial s} &= \frac{q}{(1-q)l} pf(\hat{b}) - \frac{q}{(1-q)l} \left( (1-q)(p-\hat{b}) + qp \right) f(\hat{b}) - \alpha(q) \\ &= \frac{q}{(1-q)l} (1-q) \hat{b} f'(\hat{b}) - \alpha(q) \end{aligned}$$

and

$$\frac{\partial W^2}{\partial^2 s} = \left( \frac{q}{(1-q)l} \right)^2 (1-q) \hat{b} f'(\hat{b}) + \underbrace{\left( \frac{q}{(1-q)l} \right)^2 (1-q) f(\hat{b})}_{\text{core nonconvexity}} \quad (12)$$

(compare the last addend in (12) with (10)). We are interested in conditions under which (12) is still positive. Dividing through by

$$\left( \frac{q}{(1-q)l} \right)^2 (1-q) f(\hat{b})$$

yields

$$\frac{\partial W^2}{\partial^2 s} \propto \frac{f'(\hat{b})\hat{b}}{f(\hat{b})} + 1 \quad (13)$$

The left-hand addend in (13) is the percentage change in the density per percentage change in the marginal tamperer  $\hat{b}$ ; thus, it is the elasticity of the density with respect to  $\hat{b}$ . If the density is falling, this elasticity is negative. Therefore, social welfare will be concave—that is, (12) and (13) will be nonpositive—only where the elasticity of the

density is not only negative, but less than negative one. Consider how this plays out for two common families of distributions

1. *Special Case: Truncated Normal Distribution.* Suppose, for example, that  $b$ 's density is a symmetric, truncated normal distribution with truncation bounds 0 and  $p$ , mean (and mean parameter)  $\frac{1}{2}p$ , and variance parameter  $\sigma^2$ .<sup>396</sup> Some algebra shows that the elasticity of this density is:

$$\frac{f'(b)}{f(b)}b = -\frac{(b - \frac{1}{2}p)b}{\sigma^2}. \quad (14)$$

Applying the quadratic formula and ignoring the irrelevant root, this elasticity is less than negative one if, and only if,

$$b > \frac{1}{4}p + \frac{1}{2}\sqrt{\frac{1}{4}p^2 + 4\sigma^2}. \quad (15)$$

The right hand side of (15) is always bigger than  $\frac{1}{2}p$ , the mean of the distribution of  $b$ . Therefore, at any interior solution—wherein the elasticity of the density must be less than negative one, and so (15) must hold—the manufacturer will be deterred from evidence destruction *at least* half of the time. This in itself might be regarded as inconsistent with low to middling enforcement. But, in fact, quite a bit more can be said. The larger the variance parameter  $\sigma^2$ , the greater the point at which social welfare becomes concave, thus satisfying the second-order condition. Indeed, so long as

$$\sigma \geq \frac{1}{\sqrt{2}}p,$$

social welfare is concave over its *entire* range, even though the density is falling on the upper tail.<sup>397</sup> And this means that there is no interior solution, as in the uniform distribution case considered above.

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396. The density function for this truncated normal would be

$$\frac{1}{\sqrt{2\pi}} \exp\left(-\frac{1}{2}\left(\frac{b - \frac{1}{2}p}{\sigma}\right)^2\right) / \omega,$$

where  $\omega$  is the integral from 0 to  $p$  of the corresponding normal density without truncation.

397.  $\sigma \geq \frac{1}{\sqrt{2}}p$  implies  $\frac{1}{4}p + \frac{1}{2}\sqrt{\frac{1}{4}p^2 + 4\sigma^2} > p$  and  $p$  is the upper bound on  $b$ .

2. *Special Case: Truncated Exponential Distribution.* Consider a truncated exponential density with truncation bounds 0 and  $p$  and with parameter  $\lambda$ : This density will be proportional to the exponential density without truncation:  $\lambda e^{-\lambda b}$ . (Note that  $1/\lambda$  will not be the mean of the truncated distribution.) This density is decreasing along its entire range. Yet, its elasticity is:

$$\frac{f'(b)b}{f(b)} = -\lambda b.$$

Thus, social welfare will not be concave until  $b > 1/\lambda$ . So long as  $1/\lambda > p$ , social welfare will be nowhere concave and an interior solution will be impossible.

*b. Social Cost Effects.* The effect of the core nonconvexity identified above can be overwhelmed if the marginal cost of  $s$  is sufficiently increasing. Yet, this is even more implausible at low to middling levels of enforcement than a rapidly decaying density. The phenomenon of increasing marginal costs corresponds to the exhaustion of economies of scale in enforcement. In contrast, low enforcement levels most plausibly correspond to a situation in which not all economies of scale had been tapped, and in which marginal social cost is roughly constant, if not actually decreasing.

In formal terms, with a general cost function (and a general density) we have

$$W(q, s) = \int_0^{\hat{b}} p f(\tilde{b}) d\tilde{b} + \int_{\hat{b}}^p \left( (1-q)(p - \tilde{b}) + qp \right) f(\tilde{b}) d\tilde{b} - C(q, s),$$

$$\begin{aligned} \frac{\partial W}{\partial s} &= \frac{q}{(1-q)l} p f(\hat{b}) - \frac{q}{(1-q)l} \left( (1-q)(p - \hat{b}) + qp \right) f(\hat{b}) - C_s(q, s) \\ &= \frac{q}{(1-q)l} (1-q) \hat{b} f'(\hat{b}) - C_s(q, s), \end{aligned} \quad (16)$$

and

$$\frac{\partial^2 W}{\partial s^2} = \left( \frac{q}{(1-q)l} \right)^2 (1-q) \hat{b} f''(\hat{b}) + \underbrace{\left( \frac{q}{(1-q)l} \right)^2 (1-q) f(\hat{b})}_{\text{core nonconvexity}} - C_{ss}(q, s). \quad (17)$$

Dividing (17) through by

$$\left(\frac{q}{(1-q)l}\right)^2 (1-q) f(\hat{b})$$

and using the *first-order* condition (i.e., setting (16) to zero), we obtain the following restatement of the second-order condition:

$$\frac{\partial W^2}{\partial^2 s} \propto \frac{f'(\hat{b})\hat{b}}{f(\hat{b})} + 1 - \frac{C_{ss}(q,s)s}{C_s(q,s)}. \quad (18)$$

Relative to (13), the new term here, on the far right, is the elasticity of marginal social costs in  $s$ . (Cf. the elasticity of *total* social costs.) We would expect this to be nonpositive at low levels of  $q$  and  $s$ . Therefore, this effect would most likely work in tandem with the core nonconvexity (represented by the “1” in (18)) to ensure that social welfare is not concave at low levels of  $s$  and therefore that the social optimum cannot there obtain. (Were it working in tandem with the core nonconvexity, the possibility that the density effects described above would be negative enough to produce convexity would be even less likely.)

Notice that in the uniform distribution, constant-marginal-cost model considered initially, the right side of (18) reduces to 1.

3. *The Primary Activity Approach.* In contrast, the social benefits of additional anti-tampering enforcement have a natural convexity under the primary activity approach.<sup>398</sup> Working with the general density model considered above in Section B.2.a, deterrence is:

$$\Delta = \int_0^{\hat{b}} pl f(\tilde{b}) db + \int_{\hat{b}}^p \left( (1-q)(p-b)l + q \left( pl + \underset{\uparrow}{s} \right) \right) f(\tilde{b}) db. \quad (19)$$

Mathematically, the important difference between (19) and the expression for accuracy (11) is not the addition of the scalar multiplier  $l$ , but rather the addition of  $qs$  to the right-hand integrand. The presence of this term signifies that, from an *ex ante* perspective, the manufacturer feels the expected sanction from document destruction, in those cases where destruction is worthwhile, as part of

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398. As noted, this corresponds to the statement that the social welfare *function* under this approach is naturally *concave*. See *supra* note 392.



the ex ante legal cost of designing an unsafe product. The first derivative of (19) with respect to  $s$  is:

$$\begin{aligned}
 \frac{\partial \Delta}{\partial s} &= \frac{q}{(1-q)l} \left( \cancel{p} \cancel{f(\hat{b})} \right) \\
 &\quad - \frac{q}{(1-q)l} \left( (1-q) \left( \cancel{p} - \cancel{\hat{b}} \right) l + q \left( \cancel{p} + \cancel{s} \right) \right) f(\hat{b}) \\
 &\quad + \int_{\hat{b}}^p q f(\tilde{b}) db \\
 &= \int_{\hat{b}}^p q f(\tilde{b}) db.
 \end{aligned} \tag{20}$$

Tracking the main text in Part III.A.4.b, what remains in (20) is the inframarginal effect of increasing litigation losses for manufacturers who still find it worthwhile to destroy evidence. In contrast to the effect on truth-finding, the *conversion* of marginal tamperers to marginal nontamperers has no effect on deterrence. This is because the marginal tamperer is exactly indifferent between tampering and not tampering. And so its change in behavior—from tampering to not tampering—does not change its all-in litigation losses from unsafe design, which are what matter for inducing safe design.

It is instructive to examine precisely how the first statement in (20) reduces to the second. The backslashes in the first statement in (20) represent the fact that the marginal tamperer is indifferent between tampering and not tampering taking into account the expected sanction from doing so. The cross slashes represent the fact that, given the marginal tamperer's zero net payoff from destruction, its all-in litigation losses are unaffected by changing its behavior in response to the increase in evidence destruction sanctions.

The second derivative of deterrence is:

$$\frac{\partial^2 \Delta}{\partial s} = -\frac{q}{(1-q)l} q f(\hat{b}) < 0. \tag{21}$$

This second derivative is always negative, signifying that the positive incremental effect of increasing  $s$  on deterrence is decreasing in the level of  $s$ . As noted in the text, this is because increasing  $s$  increases deterrence by virtue of its effect on the infra-margin, and this infra-margin decreases in ex ante importance as  $s$  increases.

The convexity of social welfare when the social objective is primary activity incentives also may be masked by other effects. Such effects include the two considered above for truth-finding—density effects and cost effects—as well as complications that may follow from the possibility that safe product designers will still find tampering worthwhile, as discussed in Section A.3. In addition, this effect can be confounded by countervailing curvature in the way the level of deterrence  $\Delta$  enters overall social welfare. But there is no more reason to think that any of these effects works against the convexity we have identified than to think that it works with it. And the foregoing analysis therefore justifies at least a theoretical presumption—albeit empirically rebuttable—that the primary activity approach is consistent with satisfaction of the second-order conditions at middling levels of enforcement.